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No. 1614

In the Supreme Court of the United States

OCTOBER TERM, 1970

70-130

UNITED STATES OF AMERICA, PETITIONER

v.

SCOTLAND NECK CITY BOARD OF EDUCATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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v.

SCOTLAND NECK CITY BOARD OF EDUCATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals sitting *en banc* (App. A, *infra*, pp. 1a–18a) and the dissenting opinions (App. B, *infra*, pp. 27a–43a and pp. 44a–55a) are not yet reported.

The opinion and order of the district court entered on motion for preliminary injunction (App. C, *infra*, pp. 56a–61a) are not reported; the opinion and order on permanent injunction (App. D, *infra*, pp. 62a–90a) are reported at 314 F. Supp. 65.

JURISDICTION

The judgment of the court of appeals (App. E, *infra*, p. 91a) was entered on March 23, 1971. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals erred in holding that a State may split desegregating school districts into multiple districts, even if the establishment of a unitary system is thereby impaired, unless the "primary purpose" of the split is to retain as much separation of the races as possible.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 407 of the Civil Rights Act of 1964, 42 U.S.C. 2000c–6, is set out in Appendix G, *infra,* p. 99a.

Chapter 31 of the 1969 Session Laws of North Carolina, is set out in Appendix H, *infra,* p. 101a.

STATEMENT

Scotland Neck, North Carolina, is a town with a population of approximately 3000 located in the southeastern portion of Halifax County. The schools

in Scotland Neck have been operated as part of the Halifax County Administrative Unit since 1936. Halifax County ran a completely segregated dual school system until 1965, when it adopted a freedom-of-choice desegregation plan (App. A 8a). Little integration followed (*ibid.*). After this Court's decision in 1968 in *Green* v. *School Board of New Kent County,* 391 U.S. 430, the Department of Justice, pursuant to 42 U.S.C. 2000c–6, informed the Halifax County Board that the operation of its schools did not comply with constitutional requirements. Negotiations with the Board resulted in a plan to disestablish the county's dual school system by the beginning of the 1969–70 school year. Interim steps were to be taken in 1968–69.[1] (App. A 9a.) The plan and interim steps were given wide local publicity (App. D 67a).

As a result of renewed efforts by citizens of Scotland Neck a number of months after the *Green* decision, a local law, Chapter 31, 1969 Session Laws of North Carolina (App. H 101a) was enacted by the North Carolina General Assembly on March 3, 1969.[2] Chapter 31 provided for a new school district bounded by the city limits of Scotland Neck, and for a supplemental tax assessment upon approval by a majority of the city's voters. The voters registered

[1] One such step was the combining of the 7th and 8th grades of the previously all-black Brawley school, located near the city limits of Scotland Neck, with the all-white junior high school in the city (App. D 67a–68a).

[2] Earlier unsuccessful attempts had been made by the citizens of Scotland Neck to have a law similar to Chapter 31 passed. (See App. D 69a).

their approval in a special election on April 8, 1969, and some preliminary steps were taken so that the newly-created school district—Scotland Neck City Administrative Unit—could start operation at the beginning of the 1969–70 school year (App. D 72a, 73a). Shortly thereafter, the Halifax County Board decided not to carry out the previously adopted desegregation plan (App. A 9a).

Chapter 31's implementation would have resulted in carving out of the Halifax County system, which had a student population of 10,655, a smaller school district of 695 students. The predominantly black county system consisted of 22 percent white students, 77 percent black, and 1 percent Indian; by comparison, the new, smaller district would have consisted of 57.4 percent white students and 42.6 percent black. (App. D 14a–15a). By the removal of Scotland Neck from the larger rural area its schools had traditionally served, the number of white children in schools in that area would have been reduced by almost one half (from 804 to 405) and the number of black children would have changed from 3,095 to 2,799. The County system as a whole would then have had 9,960 students, 19 percent of whom would have been white, 80 percent black and 1 percent Indian. (App A 14a).

Since the planned Scotland Neck schools could accommodate 1,000 students,[3] but would have had 695

[3] The schools in Scotland Neck were inadequate to accommodate even the original 695 students; the City therefore purchased from the County a junior high school located outside the City's boundaries (App. B52a).

pupils when Chapter 31 was implemented, the City and the County agreed to a plan allowing County students to transfer into the Scotland Neck system for a fee (App. D 74a). By August 25, 1969, 350 white and 10 black students had applied to transfer into Scotland Neck, and 44 black students had applied to transfer out. The combined effect of Chapter 31 and the transfer plan would have been a Scotland Neck system of 1,011 students, 74 percent white and 26 percent black, a Halifax County system of 9,644 students, 17 percent white, 82 percent black and 1 percent Indian, and virtually all-black enrollment in the rural area immediately surrounding Scotland Neck.[4]

1. *The decisions of the district court.* The government's complaint in this action, filed on June 16, 1969, under Section 407 of the Civil Rights Act of 1964, 42 U.S.C. 2000c–6, and 28 U.S.C. 1345, sought an order to desegregate the Halifax County school system and an injunction against the implementation of Chapter 31. After a hearing on the government's motion for a preliminary injunction, the district court, on August 25, 1969, enjoined the Scotland Neck City Board of Education from carrying out Chapter 31 pending a hearing on the merits (App. C 56a).

[4] In its amended answer to the government's complaint, the School Board withdrew the transfer plan and informed the district court that it intended to allow only such transfers as "may be in conformity to the law and/or Court order or orders applicable to Defendant, and in conformity to a plan of limitation of transfers to be prepared by Defendant and submitted to this Court." (App. A n. 4, p. 18a.) See, also, App. B52a (Winter, J., dissenting).

On December 17 and 18, 1969, there was a consolidated trial on the merits of the instant case and *Turner* v. *Warren County Board of Education* (C.A. No. 1482, E.D. N.C.),[5] which presented similar questions.[6] The district court entered its judgment on May 26, 1970, finding that a significant factor in the enactment of Chapter 31 was a desire to preserve a ratio of black to white students that would be acceptable to white parents and thereby encourage them not to take their children out of the public school system.[7] (App. D 62a.) Further, the district court found that the effect of Chapter 31 was to create a refuge for white students in Halifax County that interfered with the desegregation of Halifax County schools and prevented the County Board of Education from complying with court orders. (App. D 89a). The court also found that Chapter 31 served no state interest and, therefore, concluded that the Act was unconstitutional and its operation should be enjoined (*id.* at 90a).

2. *The decision of the court of appeals.* On appeal by the Scotland Neck City Board of Education and

[5] The *Turner* case involved the carving out of two separate city administrative units from a county system; the order and opinion enjoining such action was affirmed *sub nom. Turner* v. *Littleton-Lake Gaston School District*, C.A. 4, decided March 23, 1971 (App. F 92a).

[6] The district court permitted intervention by the Attorney General of North Carolina, certain Haliwa Indians, and certain black teachers in the Halifax County system (App. D 63a n. 1).

[7] Two other significant factors found by the court were a desire for more local control and a desire to increase the expenditures for the Scotland Neck schools.

the Attorney General of North Carolina, the court of appeals sitting *en banc*[8] reversed (App. A 1a), with Judges Sobeloff and Winter dissenting (App. B 27a, 44a). The court held that Chapter 31 did not interfere with the desegregation of the Halifax County schools, that it did not create a white refuge, and, following the rule formulated in *Wright* v. *Council of the City of Emporia* (No. 14,552), decided by the court on the same day,[9] that two non-racial justifications adequately explain the splitting-off of Scotland Neck, even assuming that a more even racial balance would be more effective in creating a unitary system in Halifax County (App. A 17a). The proposed transfer plan was enjoined, however, on the ground that it would tend to resegregate the school systems (*ibid.*).[10]

REASONS FOR GRANTING THE WRIT

As the court of appeals observed in *Emporia, supra*, "There is serious danger that the creation of new school districts may prove to be yet another method to

[8] After argument on September 16, 1970, before a panel of three judges, the case was reargued before the court *en banc* on December 7, 1970, along with the appeal in *Littleton-Lake Gaston, supra*.

[9] Three cases, *Scotland Neck*, *Emporia*, and *Littleton-Lake Gaston*, involving basically the same issues, were decided by the court of appeals on the same date. The rule of law formulated by the majority is most fully set out in *Emporia*, and the dissents in the present case are appended to that opinion. The decisions in *Emporia* and in *Littleton-Lake Gaston* are contained, respectively, in Appendices B and F, *infra*.

[10] A motion by the United States for a stay of the court of appeals' mandate in the present case pending application for certiorari is pending in the court of appeals.

obstruct the transition from racially separated school systems to school systems in which no child is denied the right to attend a school on the basis of race" (App. B 21a. Cf. *Swann* v. *Board of Education,* No. 281, this Term, decided April 20, 1971, slip op. at 9. This case raises significant questions with respect to seceding school districts and the requirements of the Fourteenth Amendment.

The court of appeals here applied the test it formulated in the *Emporia* case (App. B 21a):

> If the creation of a new school district is designed to further the aim of providing quality education and is attended secondarily by a modification of the racial balance, short of resegregation, the federal courts should not interfere. If, however, the primary purpose for creating a new school district is to retain as much of separation of the races as possible, the state has violated its affirmative constitutional duty to end state supported segregation.

This "primary purpose" test is, we submit, seriously inadequate for fulfillment of the mandate of the Fourteenth Amendment and at variance with the decisions of this Court. It encourages whites in school districts having a substantial black student population to carve out as independent districts areas that are predominantly white and, in so doing, to mask the true purpose by devising other justifications. Compare *Cooper* v. *Aaron,* 358 U.S. 1, 17. The dissenting judges in the court of appeals correctly observed that under the majority's test the constitutional mandate will be easily avoided (App. B 30a, 45a–46a).

In holding that "[s]eparate educational facilities are inherently unequal," *Brown* v. *Board of Education,* 347 U.S. 483, 495, this Court did not distinguish between racial segregation with a 40 percent racial purpose and racial segregation with a 60 percent racial purpose. Indeed, however innocent its motives, a state may not simply ignore the racial consequences of its actions, for it has long been settled that "[w]hat the Fourteenth Amendment prohibits is racial discrimination * * * whether accomplished ingeniously or ingenuously * * *". *Smith* v. *Texas,* 311 U.S. 128, 132. See *Cooper* v. *Aaron,* 358 U.S. 1, 17.

Accordingly, when the state's action produces racial segregation in the public schools, the courts must consider its constitutionality in light of the setting of the Act (for example, whether it took place in the historical setting of state-imposed segregation), the available alternatives (whether the Act's legitimate objectives could be accomplished by means having a less adverse racial impact), and the magnitude of the state's interest in pursuing the particular course of action. See, *e.g., Green* v. *School Board of New Kent County,* 391 U.S. 430; compare *McLaughlin* v. *Florida,* 379 U.S. 184; *Loving* v. *Virginia,* 388 U.S. 1.

When, as here, a dual school system is created by the "simple expedient of labeling the two sets of schools as separate districts"[11]—one with a 57:43 white to black ratio, the other with a 19:80 ratio—that is, when the state's action impedes full realization of

[11] Judge Sobeloff, dissenting (App. B 36a).

the promise of *Brown*, that action can be upheld only if the state can show a compelling justification for it. In so analyzing the secession of Scotland Neck from the Halifax County school system, the dissenting judges in the court of appeals and the district court found no such justification (App. B 37a; 50a–53a; App. D 90a). We agree.

In addition, the standard applied by the court of appeals will significantly weaken the ability of district courts to use their equitable powers as contemplated by this Court in *Brown* v. *Board of Education*, 349 U.S. 294, 300–391, to effectuate their decrees implementing the requirements of *Green* and *Alexander* v. *County Board of Education*, 396 U.S. 19. Cf. *Swann* v. *Board of Education, supra.* While the district courts may sometimes determine the various motives [12] that played a part in a decision, a requirement that they weigh the relative influence of each motive to determine which predominated will not only trap the federal courts "in a quagmire of litigation" as they seek to delve into the inner workings of the minds of legislators or other public officials, but will also sanction an easy method of evading the mandate of *Brown* (App. B 42a; App. D 77a). See *Burleson* v. *County Board of Election Commissioners of Jefferson County*, 308 F. Supp. 352, 357 (E.D. Ark.), affirmed, 432 F. 2d 1356 (C.A. 8).

[12] The possible variety of mixed motives is well illustrated by such cases as *Buchanan* v. *Warley*, 245 U.S. 60 (maintenance of public peace and property values); *Hunter* v. *Erickson*, 393 U.S. 385, 392 (need to move slowly in a delicate area of race relations); *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 260 (fear of economic loss).

Indeed, the court below has adopted a method of analysis of secessions from desegregating school systems which is at variance with the decision of the Eighth Circuit in the *Burleson* case, *supra*. In that case, the district court had enjoined the secession of the Hardin area (predominantly white) from the Dollarway School District in Arkansas (55 percent white and 45 percent black) because it would interfere with implementation of the approved desegregation plan for Dollarway. The Eighth Circuit affirmed *per curiam* based on the opinion of the district court.[13]

The standard adopted by the court below also departs from the test applied by both the Second and

[13] Several cases pending in other courts of appeals also present quite similar issues. In *United States* v. *Jefferson County Board of Education* (No. 30,387, C.A. 5, docketed August 21, 1970), the issue is whether the city of Pleasant Grove, Alabama, can separate itself from the Jefferson County school system where the separation would adversely affect implementation of a previously approved desegregation plan for Jefferson County. In *Aytch and United States* v. *Mitchell, et al.* (C.A. No. PB 70-C-127, E.D. Ark., decided January 15, 1971), the district court enjoined the holding of an election to divide the Watson Chapel School District. The defendants filed a notice of appeal on February 19, 1971. Likewise, in *United States* v. *State of Texas*, 321 F. Supp. 1043 (E.D. Tex. 1970), appeal pending (No. 71-1061, C.A. 5, docketed January 12, 1971), the district court found racial discrimination in the transfer of white residential areas from a predominantly black to a predominantly white school system. In *Lee and United States, et al.* v. *Calhoun County Board of Education, et al.*, (No. 30,154, C.A. 5, docketed July 1970), the district court treated the Calhoun County school system and the newly formed Oxford City school system as one for purposes of ruling on the sufficiency of a desegregation plan for Calhoun County (including Oxford).

the Fifth Circuits in cases involving racially discriminatory state action in other areas. In those cases the courts properly held that where action by a state agency has a racially discriminatory effect the action can be justified only by a "compelling state interest." *Kennedy Park Homes Association, Inc. and United States* v. *City of Lackawanna,* 436 F. 2d 108 (C.A. 2), certiorari denied April 5, 1971, No. 1319, this Term; *Jackson* v. *Godwin,* 400 F. 2d 529 (C.A. 5); *Hawkins* v. *Town of Shaw,* No. 29,013, C.A. 5, decided January 28, 1971); *Wright* v. *The City of Brighton, Alabama,* No. 29,262, C.A. 5, decided March 16, 1971.

Here both courts below agreed that at least one purpose for the realignment of the school districts was racial and the undeniable effect would be to create a "more white" school or schools from which the vast majority of black students in the Halifax County system would be effectively excluded. In these circumstances, the State's showing of additional, non-racial purposes fell far short of the requisite compelling justification for such a result, and the judgment of the district court enjoining the realignment should have been affirmed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1971.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 14929

UNITED STATES OF AMERICA, AND PATTIE BLACK COTTON, EDWARD M. FRANCIS, PUBLIC SCHOOL TEACHERS OF HALIFAX COUNTY, ET AL., APPELLEES

versus

SCOTLAND NECK CITY BOARD OF EDUCATION, A BODY CORPORATE, APPELLANT

No. 14930

UNITED STATES OF AMERICA, AND PATTIE BLACK COTTON, EDWARD M. FRANCIS, PUBLIC SCHOOL TEACHERS OF HALIFAX COUNTY, AND OTHERS, APPELLEES

versus

ROBERT MORGAN, ATTORNEY GENERAL OF NORTH CAROLINA, THE STATE BOARD OF EDUCATION OF NORTH NORTH CAROLINA, AND DR. A. CRAIG PHILLIPS, NORTH CAROLINA STATE SUPERINTENDENT OF PUBLIC INSTRUCTION, APPELLANTS

Appeal from the United States District Court for the Eastern District of North Carolina, at Wilson

ALGERNON L. BUTLER, District Judge, and JOHN D. LARKINS, JR., District Judge

422-400—71— 2

Argued September 16, 1970

Before BOREMAN, BRYAN and CRAVEN, Circuit Judges

Reargued December 7, 1970—Decided March 23, 1971

Before HAYNSWORTH, Chief Judge, SOBELOFF, BOREMAN, BRYAN, WINTER, CRAVEN and BUTZNER, Circuit Judges sitting en banc, on resubmission

William T. Joyner and *C. Kitchin Josey* (*Joyner & Howison* and *Robert Morgan*, Attorney General of North Carolina, on brief) for Appellants; and *Brian K. Landsberg*, Attorney, Department of Justice (*Jerris Leonard*, Assistant Attorney General, *David L. Norman*, Deputy Assistant Attorney General, and *Francis H. Kennedy, Jr.*, Attorney, Department of Justice, and *Warren H. Coolidge*, United States Attorney, on brief) for Appellee United States of America; and *James R. Walker, Jr.*, (*Samuel S. Mitchell* on brief) for Appellees Pattie Black Cotton, et al.

CRAVEN, Circuit Judge:

The Scotland Neck City Board of Education and the State of North Carolina have appealed from an order of the United States District Court for the Eastern District of North Carolina entered May 23, 1970, declaring Chapter 31 of the 1969 Session Laws of North Carolina unconstitutional and permanently enjoining any further implementation of the statute.[1] We reverse.

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[1] This is one of three cases now before the Court involving the "carving out" of part of a larger school district. The others are Alvin Turner v. Littleton-Lake Gaston School District, — F. 2d — (No. 14,990) and Wright v. Council of City of Emporia, — F. 2d — (No. 14,552).

Chapter 31 of the 1969 Session Laws of North Carolina,[2] enacted by the North Carolina General Assembly on March 3, 1969, provided for a new school district bounded by the city limits of Scotland Neck upon the

[2] Chapter 31 is entitled and reads as follows:

"AN ACT to improve and provide public schools of a higher standard for the residents of Scotland Neck in Halifax County, to establish the Scotland Neck City Administrative Unit, to provide for the administration of the public schools in said administrative unit, to levy a special tax for the public schools of said administrative unit, all of which shall be subject to the approval of the voters in a referendum or special election

SECTION 1. There is hereby classified and established a public school administrative unit to be known and designated as the Scotland Neck City Administrative Unit which shall consist of the territory or area lying and being within the boundaries or corporate limits of the Town of Scotland Neck in Halifax County, and the boundaries of said Scotland Neck City Administrative Unit shall be coterminous with the present corporate limits or boundaries of the Town of Scotland Neck. The governing board of said Scotland Neck City Administrative Unit shall be known and designated as the Scotland Neck City Board of Education, and said Scotland Neck City Board of Education (hereinafter referred to as: Board) shall have and exercise all of the powers, duties, privileges and authority granted and applicable to city administrative units and city boards of education as set forth in Chapter 115 of the General Statutes, as amended.

"SECTION 2. The Board shall consist of five members appointed by the governing authority of the Town of Scotland Neck, and said five members shall hold office until the next regular municipal election of the Town of Scotland Neck to be held in May, 1971. At the regular election for Mayor and Commissioners of the Town of Scotland Neck to be held in May, 1971, there shall be elected five members of the Board, and three persons so elected who receive the highest number of votes shall hold office for four years and the two persons elected who receive the next highest number of votes shall hold office

approval of a majority of the voters of Scotland Neck in a referendum. The new school district was approved by the voters of Scotland Neck on April 8, 1969, by a vote of 813 to 332 out of a total of 1,305 registered

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for two years, and thereafter all members of the Board so elected, as successors, shall hold office for four years. All members of the Board shall hold their offices until their successors (sic) are elected and qualified. All members of the Board shall be eligible to hold public office as required by the Constitution and laws of the State.

"SECTION 3. All members of the Board shall be elected by the qualified voters of the Town of Scotland Neck and said election shall be held and conducted by the governing authority of the Town of Scotland Neck and by its election officials and pursuant to the same laws, rules and regulations as are applicable to the election of the municipal officials of the Town of Scotland Neck, and the results shall be certified in the same manner. The election of members of the Board shall be held at the same time and place as applicable to the election of the Mayor and Board of Commissioners of the Town of Scotland Neck and in accordance with the expiration of terms of office of members of the Board. The members of the Board so elected shall be inducted into office on the first Monday following the date of election, and the expense of the election of the members of the Board shall be paid by the Board.

"SECTION 4. At the first meeting of the Board appointed as above set forth and of a new Board elected as herein provided, the Board shall organize by electing one of its members as chairman for a period of one year, or until his successor is elected and qualified. The chairman shall preside at the meetings of the Board, and in the event of his absence or sickness, the Board may appoint one of its members as temporary chairman. The Scotland Neck City Superintendent of Schools shall be ex officio secretary to his Board and shall keep the minutes of the Board but shall have no vote. If there exists a vacancy in the office of Superintendent, then the Board may appoint one of its members to serve temporarily as secretary to the Board. All vacancies in the membership of the Board by death, resignation, removal, change

voters. Prior to this date, Scotland Neck was part of the Halifax County school district. In July 1969, the United States Justice Department filed the complaint in this action against the Halifax County Board

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of residence or otherwise shall be filled by appointment by the governing authority of the Town of Scotland Neck of a person to serve for the unexpired term and until the next regular election for members of the Board when a successor shall be elected.

"SECTION 5. All public school property, both real and personal, and all buildings, facilities, and equipment used for public school purposes, located within the corporate limits of Scotland Neck and within the boundaries set forth in Section 1 of this Act, and all records, books, moneys budgeted for said facilities, accounts, papers, documents and property of any description shall become the property of Scotland Neck City Administrative Unit or the Board; all real estate belonging to the public schools located within the above-described boundaries is hereby granted, made over to, and automatically by force of this Act conveyed to the Board from the County public school authorities. The Board of Education of Halifax County is authorized and directed to execute any and all deeds, bills of sale, assignments or other documents that may be necessary to completely vest title to all such property to the Board.

"SECTION 6. Subject to the approval of the voters residing within the boundaries set forth in Section 1 of this Act, or within the corporate limits of the Town of Scotland Neck, as hereinafter provided, the governing authority of the Town of Scotland Neck, in addition to all other taxes, is authorized and directed to levy annually a supplemental tax not to exceed Fifty Cents (50c) on each One Hundred ($100.00). Dollars of the assessed value of the real and personal property taxable in said Town of Scotland Neck. The amount or rate of said tax shall be determined by the Board and said tax shall be collected by the Tax Collector of the Town of Scotland Neck and paid to the Treasurer of the Board. The Board may use the proceeds of the tax so collected to supplement any object or item in the school budget as fixed by law or to supplement

of Education seeking the disestablishment of a dual school system operated by the Board and seeking a declaration of invalidity and an injunction against the implementation of Chapter 31. Scotland Neck

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any object or item in the Current Expense Fund or Capital Outlay Fund as fixed by law.

"SECTION 7. Within ten days from the date of the ratification of this Act it shall be the duty of the governing authority of the Town of Scotland Neck to call a referendum or special election upon the question of whether or not said Scotland Neck City Administrative Unit and its administrative board shall be established and whether or not the special tax herein provided shall be levied and collected for the purposes herein provided. The notice of the special election shall be published once a week for two successive weeks in some newspaper published in the Town of Scotland Neck. The notice shall contain a brief statement of the purpose of the special election, the area in which it shall be held, and that a vote by a majority of those voting in favor of this Act will establish the Scotland Neck City Administrative Unit and its Administrative Board as herein set forth, and that an annual tax not to exceed Fifty Cents (50c) on the assessed valuation of real and personal property, according to each One Hundred Dollars ($100.00) valuation, the rate to be fixed by the Board, will be levied as a supplemental tax in the Town of Scotland Neck, for the purpose of supplementing any lawful public school budgetary item. A new registration of voters shall not be required and in all respects the laws and regulations under which the municipal elections of the Town of Scotland Neck are held shall apply to said special election. The governing authority of the Town of Scotland Neck shall have the authority to enact reasonable rules and regulations for the necessary election books, records and other documents for such special election and to fix the necessary details of said special election.

"SECTION 8. In said referendum or special election a ballot in form substantially as follows shall be used: VOTE FOR ONE:

"( ) FOR creating and establishing Scotland Neck City Administrative Unit with administrative Board to operate pub-

City Board of Education was added as a defendant in August 1969, and the Attorney General of North Carolina was added as a defendant in November 1969. On August 25, 1969, the District Court issued a temporary injunction restraining the implementation of Chapter 31, and thereafter on May 23, 1970, made the injunction permanent. The District Court reasoned that Chapter 31 was unconstitutional because it would create a refuge for white students and would interfere with the desegregation of the Halifax County school system.

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lic schools of said Unit and for supplemental tax not to exceed Fifty Cents (50c) on the assessed valuation of real and personal property according to each One Hundred Dollars ($100.00) valuation for objects of school budget.

"( ) AGAINST creating and establishing Scotland Neck City Administrative Unit with administrative Board to operate public schools of said Unit and against supplemental tax not to exceed Fifty Cents (50c) on the assessed valuation of real and personal property according to each One Hundred Dollars ($100.00) valuation for objects of school budget.

"If a majority of the qualified voters voting at such referendum or special election vote in favor of establishing Scotland Neck City Administrative Unit, for creation of administrative Board to operate public schools of said Unit and for special supplemental tax as herein set forth, then this Act shall become effective and operative as to all its provisions upon the date said special election results are canvassed and the result judicially determined, otherwise to be null and void. The expense of said referendum or special election shall be paid by the governing authority of the Town of Scotland Neck but if said Unit and Board are established, then said Town of Scotland Neck shall be reimbursed by the Board for said expense as soon as possible.

"SECTION 9. All laws and clauses of laws in conflict with this Act are hereby repealed.

"SECTION 10. This Act shall be in full force and effect according to its provisions from and after its ratification."

It is clear that Chapter 31 is not unconsitutional on its face. But a facially constitutional statute may in the context of a given fact situation be applied unfairly or for a discriminatory purpose in violation of the equal protection clause of the Fourteenth Amendment. *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886). We cannot judge the validity of the statute in vacuo but must examine it in relation to the problem it was meant to solve. *Poindexter* v. *Louisiana Financial Assistance Commission,* 275 F. Supp. 833 (E.D. La. 1967).

I

THE HISTORY OF SCHOOL DESEGREGATION IN HALIFAX COUNTY AND THE ATTEMPTS TO SECURE A SEPARATE SCHOOL DISTRICT FOR THE CITY OF SCOTLAND NECK

For many years until 1936, the City of Scotland Neck was a wholly separate school district operating independently of the Halifax County school system into which it was then merged. Both the elementary and the high school buildings presently in use in Scotland Neck were constructed prior to 1936 and were financed by city funds.

Halifax County operated a completely segregated dual school system from 1936 to 1965. In 1965, Halifax County adopted a freedom-of-choice plan. Little integration resulted during the next three years. Shortly after the Supreme Court decision in *Green* v. *County School Board of New Kent County,* 391 U.S. 430, in May of 1968, the Halifax County Board of Education requested the North Carolina Department of Public Instruction to survey their schools and to make recommendations regarding desegregation of the school system.

In July 1968, the Justice Department sent a "notice letter" to the Halifax County Board notifying them that they had not disestablished a dual school system and that further steps would be necessary to comply with *Green*. After negotiations with the Justice Department, the Halifax County Board agreed informally to disestablish their dual school system by the beginning of the 1969–70 school year, with a number of interim steps to be taken in the 1968–69 school year. As part of the interim steps, the seventh and eighth grades were transferred from the Brawley School, an all-black school located just outside the city limits of Scotland Neck, to the Scotland Neck School, previously all white.

The results of the North Carolina Department of Public Instruction survey were published in December of 1968. It recommended an interim plan and a long range plan. The interim plan proposed the creation of a unitary school system through a combination of geographic attendance zones and pairing of previously all-white schools with previously all-black schools. Scotland Neck School was to be paired with Brawley School, grades 1–4 and 8–9 to attend Brawley and grades 5–6 and 10–12 to attend Scotland Neck. The long range plan called for the building of two new consolidated high schools, each to serve half of the geographic area composing the Halifax County school district. The Halifax County Board of Education declined to implement the plan proposed by the Department of Public Instruction and the Justice Department filed suit in July 1969.

Paralleling this history of school segregation in the Halifax County school system is a history of attempts on the part of the residents of Scotland Neck to ob-

tain a separate school district. The proponents of a separate school district began to formulate their plans in 1963, five years prior to the *Green* decision and two years prior to the institution of freedom-of-choice by the Halifax County Board. They were unable to present their plan in the form of a bill prior to the expiration of the 1963 session of the North Carolina Legislature, but a bill was introduced in the 1965 session which would have created a separate school district composed of Scotland Neck and the four surrounding townships, funded partially through local supplemental property taxes. The bill did not pass and it was the opinion of many of the Scotland Neck residents that its defeat was the result of opposition of individuals living outside the city limits of Scotland Neck.

At the instigation of the only Halifax County Board of Education member who was a resident of Scotland Neck, a delegation from the Halifax County schools attempted in 1966 to get approval for the construction of a new high school facility in Scotland Neck to be operated on a completely integrated basis. The proposal was not approved by the State Division of School Planning.

After visiting the smallest school district in the state to determine the economic feasibility of creating a separate unit for the City of Scotland Neck alone, the proponents of a separate school district again sponsored a bill in the Legislature. It was this bill which was eventually passed on March 31, 1969, as Chapter 31 of the Session Laws of 1969.

II

THE THREE PURPOSES OF CHAPTER 31

The District Court found that the proponents of a special school district had three purposes in mind in sponsoring Chapter 31 and the record supports these findings. First, they wanted more local control over their schools. Second, they wanted to increase the expenditures for their schools through local supplementary property taxes. Third, they wanted to prevent anticipated white fleeing of the public schools.

Local control and increased taxation were thought necessary to increase the quality of education in their schools. Previous efforts to upgrade Scotland Neck Schools had been frustrated. Always it seemed the needs of the County came before Scotland Neck. The only county-wide bond issue passed in Halifax County since 1936 was passed in 1957. Two local school districts operating in Halifax County received a total of $1,020,000 from the bond issue and the Halifax County system received $1,980,000. None of the money received by Halifax County was spent on schools within the city limits of Scotland Neck. If Scotland Neck had been a separate school district at the time, it would have received $190,000 as its proportionate share of the bond issue. The Halifax County system also received $950,000 in 1963 as its proportionate share of the latest statewide bond issue. None of this money was spent or committed to any of the schools within the city limits of Scotland Neck. Halifax County has reduced its annual capital outlay tax from 63 cents per $100 valuation in 1957 to 27.5 cents per $100 valuation in the latest fiscal year. In order for the referendum to pass under the terms of Chapter 31, the voters of Scotland Neck had to approve not

only the creation of a separate school district but in addition had to authorize a local supplementary property tax not to exceed 50 cents per $100 valuation per year. Despite such a political albatross the referendum was favorable, and moreover, the supplementary tax was levied by the Scotland Neck Board at the full 50 cent rate.

III

WHITE FLEEING—THE QUESTIONABLE THIRD PURPOSE

But it is not the permissable first purpose or the clearly commendable second purpose which caused the District Court to question the constitutionality of Chapter 31. It is rather the third purpose, a desire on the part of the proponents of Chapter 31 to prevent, or at least diminish, the flight of white students from the public schools, that concerned the District Court. The population of Halifax County is predominantly black. The population of Scotland Neck is approximately 50 percent black and 50 percent white, and the District Court found that the pupil ratio by race in the schools would have been 57.3 percent white to 42.7 percent black.

A number of decisions have mentioned the problem of white flight following the integration of school systems which have a heavy majority of black students. *Monroe* v. *Board of Commissioners of the City of Jackson;* 391 U.S. 450, 459 (1968); *Brunson* v. *Board of Trustees of School District No. 1 of Clarendon County,* — F. 2d — (4th Cir. 1970); *Walker* v. *County School Board of Brunswick County,* 413 F. 2d 53 (4th Cir. 1969); *Anthony* v. *Marshall County Board of Education,* 409 F. 2d 1287 (5th Cir. 1969). All of these cases hold that the threat of white flight will not justify the continuing operation of a dual

school system. But it has never been held by any court that a school board (or a state) may not constitutionally consider and adopt measures for the purpose of curbing or diminishing white flight from a unitary school system. Indeed it seems obvious that such a purpose is entirely consistent with and may help implement the *Brown* principle. It is not the purpose of preventing white flight which is the subject of judicial concern but rather the price of achievement. If the effect of Chapter 31 is to continue a dual school system in Halifax County, or establish one in Scotland Neck, the laudable desire to stem an impending flow of white students from the public schools will not save it from constitutional infirmity. But if Chapter 31 does not have that effect, the desire of its proponents to halt white flight will not make an otherwise constitutional statute unconstitutional.

In considering the effect of Chapter 31 on school desegregation in Halifax County and Scotland Neck, it is important to distinguish the effect of Chapter 31 from the effect of a transfer plan adopted by the Scotland Neck Board of Education. The effect of the transfer plan was to substantially increase the percentage of white students in the Scotland Neck schools. But the transfer plan is solely the product of the Scotland Neck Board of Education and not Chapter 31. Therefore the effect of the transfer plan has no relevance to the question of the constitutionality of Chapter 31.[3]

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[3] Appellees argue that the creation of the transfer plan is evidence that the intended effect of Chapter 31 was to preserve the previous racial makeup of the Scotland Neck schools. We disagree.

We are concerned here with the intent of the North Carolina Legislature and not the intent of the Scotland Neck Board. In determining legislative intent of an act such as Chapter 31,

The District Court held that the creation of a separate Scotland Neck School district would unconstitutionally interfere with the implementation of a plan to desegregate the Halifax County schools adopted by the Halifax County Board of Education. We hold that the effect of the separation of the Scotland Neck schools and students on the desegregation of the remainder of the Halifax County system is minimal and insufficient to invalidate Chapter 31. During the 1968–69 school year, there were 10,655 students in the Halifax County Schools, 8,196 (77%) were black, 2,357 (22%) were white, and 102 (1%) were Indian. Of this total, 605 children of school age, 399 white and 296 black, lived within the city limits of Scotland Neck. Removing the Scotland Neck students from the Halifax County system would have left 7,900 (80%) black students, 1,958 (19%) white students, and 102 (1%) Indian students. This is a shift in the ratio of black to white students of only 3 percent, hardly a substantial change. Whether the Scotland Neck students remain within the Halifax County system or attend separate schools of their own, the Halifax County schools will have a substantial majority of black students. Nor would there be a per pupil de-

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it is appropriate to consider the reason that the proponents of the act desired its passage if it can be inferred that those reasons were made known to the Legislature. There is evidence in the record to show that the three purposes that the District Court found were intended by the proponents of Chapter 31 were presented to the Legislature. However, there is nothing in the record to suggest that the Legislature had any idea that the Scotland Neck Board would adopt a transfer plan after the enactment of Chapter 31 which would have the effect of increasing the percentage of white students.

We will discuss the transfer plan later in a separate part of the opinion.

crease in the proceeds from the countywide property taxes available in the remaining Halifax County system. The county tax is levied on all property in the county and distributed among the various school districts in the county on a per pupil basis. In addition, the Superintendent of Schools for the Halifax County system testified that there would be no decrease in teacher-pupil ratio in the remaining Halifax County system and in fact that in a few special areas, such as speech therapy, the teacher-pupil ratio may actually increase.

Nor can we agree with the District Court that Chapter 31 creates a refuge for the white students of the Halifax County system. Although there are more white students than black students in Scotland Neck, the white majority is not large, 57.3 percent white and 42.6 percent black. Since all students in the same grade would attend the same school, the system would be integrated throughout. There is no indication that the geographic boundaries were drawn to include white students and exclude black students as there has been in other cases where the courts have ordered integration across school district boundaries. *Haney v. County Board of Education of Sevier County*, 410 F. 2d 920 (8th Cir. 1969). The city limits provide a natural geographic boundary. There is nothing in the record to suggest that the greater percentage of white students in Scotland Neck is a product of residential segregation resulting in part from state action. See *Brewer v. School Board of the City of Norfolk*, 397 F. 2d 37 (4th Cir. 1968).

From the history surrounding the enactment of Chapter 31 and from the effect of Chapter 31 on school desegregation in Halifax County, we conclude that the purpose of Chapter 31 was not to invidiously

discriminate against black students in Halifax County and that Chapter 31 does not violate the equal protection clause of the Fourteenth Amendment.

Appellees urge in their brief that conceptually the way to analyze this case is to "view the results of severance as if it were part of a desegregation plan for the original system." We do not agree. The severance was not part of a desegregation plan proposed by the school board but was instead an action by the Legislature redefining the boundaries of local governmental units. If the effect of this act was the continuance of a dual school system in Halifax County or the establishment of a dual system in Scotland Neck it would not withstand challenge under the equal protection clause, but we have concluded that it does not have that effect.

But assuming for the sake of argument that the appellees' method of analysis is correct, we conclude that the severance of Scotland Neck students would still withstand constitutional challenge. Although it is not entirely clear from their brief, appellants' apparent contention is that the variance in the ratio of black to white students in Scotland Neck from the ratio in the Halifax County system as a whole is so substantial that if Scotland Neck was proposed as a geographic zone in a desegregation plan, the plan would have to be disapproved. The question of "whether, as a constitutional matter, any particular racial balance must be achieved in the schools" has yet to be decided by the courts. *Northcross v. Board of Education of Memphis,* —U.S.—, 90, S. Ct. 891, 893 (1970) (Burger, C. J., concurring). In its first discussion of remedies for school segregation, *Brown v. Board of Education of Topeka,* 349 U.S. 294 (1955) (Brown II), the Supreme Court spoke in terms of "practical flexibility" and "reconciling pub-

lic and private needs." 349 U.S. at 300. In *Green v. County School Board of New Kent County,* 391 U.S. 430 (1968), the court made it clear that the school board has the burden of explaining its preference for a method of desegregation which is less effective in disestablishing a dual school system than another more promising method. Even if we assume that a more even racial balance throughout the schools of Halifax County would be more effective in creating a unitary school system, we conclude that the deviation is adequately explained by the inability of people of Scotland Neck to be able to increase the level of funding of the schools attended by their children when the geographic area served by those schools extended beyond the city limits of Scotland Neck.

Our conclusion that Chapter 31 is not unconstitutional leaves for consideration the transfer plan adopted by the Scotland Neck School Board. The transfer plan adopted by the Board provided for the transfer of students from the remaining Halifax County system into the Scotland Neck system and from the Scotland Neck system into the Halifax County system. Transfers into the Scotland Neck system were to pay $100 for the first child in a family, $25 for the next two children in a family, and no fee for the rest of the children in a family. As a result of this transfer plan, 350 white students and 10 black students applied for transfer into the Scotland Neck system, and 44 black students applied for transfer out of the system. The net result of these transfers would have been to have 74 percent white students and 26 percent black students in the Scotland Neck system. We conclude that these transfers would have tended toward establishment of a resegregated system and that the transfer plan violates the equal protection clause of the Fourteenth Amend-

ment.[4] See *Monroe v. Board of Commissioners of the City of Jackson*, 391 U.S. 450 (1968).

We reverse the judgment of the District Court holding Chapter 31 unconstitutional, and remand to the District Court with instructions to dissolve its injunction. The District Court will retain jurisdiction to consider plans of integration proposed by Halifax County Board of Education and by Scotland Neck Board of Education.

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[4] Perhaps it should be noted that in the school board's amended answer filed on September 3, 1969, it withdrew the original transfer plan and represented to the District Court that it intended to allow only such transfers as "may be in conformity to the law and/or Court order or orders applicable to Defendant, and in conformity to a plan of limitation of transfers to be prepared by Defendant and submitted to this Court."

APPENDIX B

United States Court of Appeals for the Fourth Circuit

No. 14552

PECOLA ANNETTE WRIGHT, ET AL., APPELLEES

v.

COUNCIL OF THE CITY OF EMPORIA AND THE MEMBERS THEREOF, AND SCHOOL BOARD OF THE CITY OF EMPORIA AND THE MEMBERS THEREOF, APPELLANTS

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond

ROBERT R. MERHIGE, JR., District Judge

Argued October 8, 1970—Decided March 23, 1971

Before HAYNSWORTH, Chief Judge, BOREMAN, BRYAN, WINTER, and CRAVEN, Circuit Judges sitting en banc*

John F. Kay, Jr., and *D. Dortch Warriner* (*Warriner, Outten, Slagle & Barrett;* and *Mays, Valentine, Davenport & Moore* on brief) for Appellants, and *S. W. Tucker* (*Henry L. Marsh, III*, and *Hill, Tucker & Marsh;* and *Jack Greenberg, James M. Nabrit, III*, and *Norman Chachkin* on brief) for Appellees.

CRAVEN, *Circuit Judge:* In this case and two others now under submission en banc we must determine the extent of the power of state government to

*Judge Sobeloff did not participate. Judge Butzner disqualified himself because he participated as a district judge in an earlier stage of this case.

redesign the geographic boundaries of school districts.[1] Ordinarily, it would seem to be plenary but in school districts with a history of racial segregation enforced through state action, close scrutiny is required to assure there has not been gerrymandering for the purpose of perpetuating invidious discrimination.

Each of these cases involve a county school district in which there is a substantial majority of black students out of which was carved a new school district comprised of a city or a city plus an area surrounding the city. In each case, the resident students of the new city unit are approximately 50 percent black and 50 percent white. In each case, the district court enjoined the establishment of the new school district. In this case, we reverse.

I

If legislation creating a new school district produces a shift in the racial balance which is great enough to support an inference that the purpose of the legislation is to perpetuate segregation, and the district judge draws the inference, the enactment falls under the Fourteenth Amendment and the establishment of such a new school district must be enjoined. See *Gomillion* v. *Lightfoot*, 364 U.S. 399 (1960). Cf. *Haney* v. *County Board of Education of Sevier County*, 410 F. 2d 920 (8th Cir. 1969); *Burleson* v. *County Board of Election Commissioners of Jefferson County*, 308 F. Supp. 352 (E.D. Ark.) aff'd — F. 2d —, No. 20228 (8th Cir. Nov. 18, 1970). But where the shift is merely a modification of the racial ratio rather than effective resegregation the problem becomes more difficult.

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[1] The other two cases are *United States* v. *Scotland Neck City Board of Education*, — F. 2d —, Nos. 14929 and 14930 (4th Cir. —, 1971) and *Turner* v. *Littleton-Lake Gaston School District*. — F. 2d —, No. 14990 (4th Cir. —, 1971).

The creation of new school districts may be desirable and/or necessary to promote the legitimate state interest of providing quality education for the state's children. The refusal to allow the creation of any new school districts where there is any change in the racial makeup of the school districts could seriously impair the state's ability to achieve this goal. At the same time, the history of school integration is replete with numerous examples of actions by state officials to impede the mandate of *Brown* v. *Board of Education*, 349 U.S. 294 (1955) (*Brown II*). There is serious danger that the creation of new school districts may prove to be yet another method to obstruct the transition from racially separated school systems to school systems in which no child is denied the right to attend a school on the basis of race. Determining into which of these two categories a particular case fits requires a careful analysis of the facts of each case to discern the dominant purpose of boundary realignment. If the creation of a new school district is designed to further the aim of providing quality education and is attended secondarily by a modification of the racial balance, short of resegregation, the federal courts should not interfere. If, however, the primary purpose for creating a new school district is to retain as much of separation of the races as possible, the state has violated its affirmative constitutional duty to end state supported school segregation. The test is much easier to state than it is to apply.

II

Emporia became a city of the so-called second class on July 31, 1967, pursuant to a statutory procedure established at least as early as 1892. See 3 Va. Code § 15.1–978 to –998 (1950); Acts of the Assembly 1891–92, ch. 595. Prior to that time it was an incorporated

town and as such was part of Greensville County. At the time city status was attained Greensville County was operating public schools under a freedom of choice plan approved by the district court, and *Green* v. *County School Board of New Kent County,* 391 U.S. 430 (1968), invalidating freedom of choice unless it "worked," could not have been anticipated by Emporia, and indeed, was not envisioned by this court. *Bowman* v. *County School Board of Charles City County,* 382 F. 2d 326 (4th Cir. 1967). The record does not suggest that Emporia chose to become a city in order to prevent or diminish integration. Instead, the motivation appears to have been an unfair allocation of tax revenues by county officials.

One of the duties imposed on Emporia by the Virginia statutes as a city of the second class was to establish a school board to supervise the public education of the city's children. Under the Virginia statutes, Emporia had the option of operating its own school system or to work out one of a number of alternatives under which its children would continue to attend school jointly with the county children. Emporia considered operating a separate school system but decided it would not be practical to do so immediately at the time of its independence. There was an effort to work out some form of joint operation with the Greensville County schools in which decision making power would be shared. The county refused. Emporia finally signed a contract with the county on April 10, 1968, under which the city school children would attend schools operated by the Greensville County School Board in exchange for a percentage of the school system's operating cost. Emporia agreed to this form of operation only when given an ultimatum by the county in March 1968 that it would stop educating the city children mid-term unless some agreement was reached.

At the same time that the county was engaged in its controversy with Emporia about the means of educating the city children, the county was also engaged in a controversy over the elimination of racial segregation in the county schools. Until sometime in 1968, Greensville County operated under a freedom of choice plan. At that time the plaintiffs in this action successfully urged upon the district court that the freedom of choice plan did not operate to disestablish the previously existing dual school system and thus was inadequate under *Green* v. *County School Board of New Kent County, supra.* After considering various alternatives, the district court, in an order dated June 25, 1969, paired all the schools in Greensville County.

Also in June 1969, Emporia was notified for the first time by counsel that in all probability its contract with the county for the education of the city children was void under state law. The city then filed an action in the state courts to have the contract declared void and notified the county that it was ending its contractual relationship forthwith. Parents of city school children were notified that their children would attend a city school system. On August 1, 1969, the plaintiffs filed a supplemental complaint seeking an injunction against the City Council and the City School Board to prevent the establishment of a separate school district. A preliminary injunction against the operation of a separate system was issued on August 8, 1969. The temporary injunction was made permanent on March 3, 1969.[2]

The Emporia city unit would not be a white island in an otherwise heavily black county. In fact, even in

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[2] The decision of the court below is reported as *Wright* v. *County School Board of Greensville County*, 309 F. Supp. 671 (E.D. Va. 1970).

Emporia there will be a majority of black students in the public schools, 52 percent black to 48 percent white. Under the plan presented by Emporia to the district court, all of the students living within the city boundaries would attend a single high school and a single grade school. At the high school there would be a slight white majority, 48 percent black and 52 percent white, while in the grade school there would be a slight black majority, 54 percent black and 46 percent white. The city limits of Emporia provide a natural geographic boundary for a school district.

The student population of the Greensville County School District without the separation of the city unit is 66 percent black and 34 percent white. The students remaining in the geographic jurisdiction of the county unit after the separation would be 72 percent black and 28 percent white. Thus, the separation of the Emporia students would create a shift of the racial balance in the remaining county unit of 6 percent. Regardless of whether the city students attend a separate school system, there will be a substantial majority of black students in the county system.

Not only does the effect of the separation not demonstrate that the primary purpose of the separation was to perpetuate segregation, but there is strong evidence to the contrary. Indeed, the district court found that Emporia officials had other purposes in mind. Emporia hired Dr. Neil H. Tracey, a professor of education at the University of North Carolina, to evaluate the plan adopted by the district court for Greensville County and compare it with Emporia's proposal for its own school system. Dr. Tracey said his studies were made with the understanding that it was not the intent of the city to resegregate. He testified that the plan adopted for Greensville County would require additional expenditures for transpor-

tation and that an examination of the proposed budget for the Greensville County Schools indicated that not only would the additional expenditures not be forthcoming but that the budget increase over the previous year would not even keep up with increased costs due to inflation. Emporia on the other hand proposed increased revenues to increase the quality of education for its students and in Dr. Tracey's opinion the proposed Emporia system would be educationally superior to the Greensville system. Emporia proposed lower student teacher ratios, increased per pupil expenditures, health services, adult education, and the addition of a kindergarten program.

In sum, Emporia's position, referred to by the district court as "uncontradicted," was that effective integration of the schools in the whole county would require increased expenditures in order to preserve education quality, that the county officials were unwilling to provide the necessary funds, and that therefore the city would accept the burden of educating the city children. In this context, it is important to note the unusual nature of the organization of city and county governments in Virginia. Cities and counties are completely independent, both politically and geographically. See *City of Richmond* v. *County Board,* 199 Va. 679, 684 (1958); *Murray* v. *Roanoke,* 192 Va. 321, 324 (1951). When Emporia was a town, it was politically part of the county and the people of Emporia were able to elect representatives to the county board of supervisors. When Emporia became a city, it was completely separated from the county and no longer has any representation on the county board. In order for Emporia to achieve an increase in school expenditures for city schools it would have to obtain the approval of the Greensville County Board of

Supervisors whose constituents do not include city residents.

Determining what is desirable or necessary in terms of funding for quality education is the responsibility of state and school district officers and is not for our determination. The question that the federal courts must decide is, rather, what is the primary purpose of the proposed action of the state officials. See *Developments in the Law—Equal Protection,* 82 Harv. L. Rev. 1065 (1969). Is the primary purpose a benign one or is the claimed benign purpose merely a cover-up for racial discrimination? The district court must, of course, consider evidence about the need for and efficacy of the proposed action to determine the good faith of the state officials' claim of benign purpose. In this case, the court did so and found explicitly that "[t]he city clearly contemplates a superior quality education program. It is anticipated that the cost will be such as to require higher tax payments by city residents." 309 F. Supp. at 674. Notably, there was no finding of discriminatory purpose, and instead the court noted its satisfaction that the city would, if permitted, operate its own system on a unitary basis.

We think the district court's injunction against the operation of a separate school district for the City of Emporia was improvidently entered and unnecessarily sacrifices legitimate and benign educational improvement. In his commendable concern to prevent resegregation—under whatever guise—the district judge momentarily overlooked, we think, his broad discretion in approving equitable remedies and the practical flexibility recommended by *Brown II* in reconciling public and private needs. We reverse the judgment of the district court and remand with instructions to dissolve the injunction.

Because of the possibility that Emporia might institute a plan for transferring students into the city system from the county system resulting in resegregation,[3] or that the hiring of teachers to serve the Emporia school system might result in segregated faculties, the district court is directed to retain jurisdiction.

Reversed and remanded.

SOBELOFF, *Senior Circuit Judge,* with whom WINTER, *Circuit Judge,* joins, dissenting and concurring specially: In respect to Nos. 14929 and 14930, *United States* v. *Scotland Neck City Board of Education,* — F. 2d — (4th Cir. 1971), and No. 14990, *Turner* v. *Littleton-Lake Gaston School District,* — F. 2d — (4th Cir. 1971), the two cases in which I participated, I dissent from the court's reversal in *Scotland Neck* and concur in its affirmance in *Littleton-Lake Gaston.* I would affirm the District Court in each of those cases. I join in Judge Winter's opinion, and since he has treated the facts analytically and in detail, I find it unnecessary to repeat them except as required in the course of discussion. Not having participated in No. 14552, *Wright* v. *Council of City of Emporia,* — F. 2d — (4th Cir. 1971), I do not vote on that appeal, although the views set forth below necessarily reflect on that decision as well, since the principles enunciated by the majority in that case are held to govern the legal issue common to all three of these school cases.

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[3] A notice of August 31, 1969, invited applications from the county. Subsequently, the city assured the district court it would not entertain such applications without court permission.

I

The history of the evasive tactics pursued by white communities to avoid the mandate of *Brown* v. *Board of Education*, 349 U.S. 294 (1955), is well documented. These have ranged from outright nullification by means of massive resistance laws [1] and open and occasionally violent defiance,[2] through discretionary pupil assignment laws [3] and public tuition grants in support of private segregated schools,[4] to token integration plans parading under the banner "freedom-

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[1] *See Duckworth* v. *James*, 267 F. 2d 224 (4th Cir. 1959); *Bush* v. *Orleans Parish School Bd.*, 188 F. Supp. 916 (E.D. La. 1960), *aff'd per curiam*, 365 U.S. 569 (1961); *Bush* v. *Orleans Parish School Bd.*, 187 F. Supp. 42 (E.D. La. 1960), *aff'd Per curiam*, 365 U.S. 569 (1961); *Aaron* v. *McKinley*, 173 F. Supp. 944 (E.D. Ark. 1959); *aff'd sub nom. Faubus* v. *Aaron*, 361 U.S. 197 (1959); *James* v. *Almond*, 170 F. Supp. 331 (E.D. Va. 1959), *app. dis.*, 359 U.S. 1006 (1959); *Harrison* v. *Day*, 200 Va. 439, 106 S.E. 2d 636 (1959) (decided the same day as *James* v. *Almond*, *supra*).

[2] *See Cooper* v. *Aaron*, 358 U.S. 1 (1958); *Armstrong* v. *Board of Education of City of Birmingham, Ala.*, 323 F. 2d 333 (5th Cir. 1963), *cert. denied sub nom. Gibson* v. *Harris*, 376 U.S. 908 (1964); *Brewer* v. *Hoxie School District No. 46*, 238 F. 2d 91 (8th Cir. 1956); *Holmes* v. *Danner*, 191 F. Supp. 394 (M.D. Ga. 1961), *stay denied*, 364 U.S. 939 (1961).

[3] *See Northcross* v. *Board of Education of City of Memphis*, 302 F. 2d 818 (6th Cir. 1962); *Manning* v. *Board of Public Instruction*, 277 F. 2d 370 (5th Cir. 1960); *Gibson* v. *Board of Public Instruction, Dade County, Fla.*, 272 F. 2d 763 (5th Cir. 1959); *Orleans Parish School Board* v. *Bush*, 242 F. 2d 156 (5th Cir. 1957); *United States Commission on Civil Rights, Civil Rights USA—Public Schools, Southern States*, 2–17 (1962).

[4] *See Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218 (1964); *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649 (E.D. La. 1961, *aff'd*, 368 U.S. 515 (1962).

of-choice."[5] One by one these devices have been condemned by the Supreme Court:

> [T]he constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously." *Cooper* v. *Aaron*, 358 U.S. 1, 17 (1958).

Neither these agencies, nor school boards, nor local communities have the right to put roadblocks in the way of effective integration. The Court has declared that "the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools." *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19, 20 (1969).

Today, I fear, we behold the emergence of a further stratagem—the carving out of new school districts in order to achieve racial compositions more acceptable to the white community. The majority frankly acknowledges the "serious danger that the creation of new school districts may prove to be yet another method to obstruct the transition from racially separate school systems to school systems in which no child is denied the right to attend a school on the basis of race," *Emporia, supra* at 4. However, the court fashions a new and entirely inappropriate doctrine to avert that danger. It directs District Courts to weigh and assess the various purposes that may have moved

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[5] *See Green* v. *County School Board*, 391 U.S. 430 (1968); *Raney* v. *Board of Education*, 391 U.S. 443 (1968); *Monroe* v. *Board of Commissioners*, 391 U.S. 450 (1968).

the proponents of the new school district, with the objective of determining which purpose is dominant. District Courts are told to intercede *only* if they find that racial considerations were the *primary* purpose in the creation of the new school units.[6] I find no precedent for this test and it is neither broad enough nor rigorous enough to fulfill the Constitution's mandate. Moreover, it cannot succeed in attaining even its intended reach, since resistant white enclaves will quickly learn how to structure a proper record—shrill with protestations of good intent, all consideration of racial factors muted beyond the range of the court's ears.[7]

If challenged state action has a racially discriminatory effect, it violates the equal protection clause unless a compelling and overriding legitimate state interest is demonstrated. This test is more easily applied, more fully implements the prohibition of the Fourteenth Amendment and has already gained firm root in the law. The Supreme Court has explicitly applied this test to state criminal statutes which on their face establish racial classifications. In 1964, striking down a Florida criminal statute which forbade a man and woman of different races to "habitually live in and occupy in the nighttime the same room," the Court stated in an opinion written by Justice White:

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[6] The majority's test as stated in *Emporia*, *supra*, is as follows: "Is the primary purpose a benign one or is the claimed benign purpose merely a cover-up for racial discrimination?"

[7] The impracticability of the majority's test is highlighted by the dilemma in which the District Judges found themselves in *Scotland Neck:* "In ascertaining such a subjective factor as motivation and intent, it is of course impossible for this Court to accurately state what proportion each of the above reasons played in the minds of the proponents of the bill, the legislators or the voters of Scotland Neck * * *. *United States* v. *Halifax County Board of Education*, 314 F. Supp. 65, 72 (E.D.N.C. 1970)."

> Normally, the widest discretion is allowed the legislative judgment * * *; and normally that judgment is given the benefit of every conceivable circumstance which might suffice to characterize the classification as reasonable rather than arbitrary and invidious. [Citations] But we deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications "constitutionally suspect," *Bolling* v. *Sharpe,* 347 U.S. 497, 499; and subject to the most "rigid scrutiny," *Korematsu* v. *United States,* 323 U.S. 214, 216; and "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose, *Hirabayashi* v. *United States,* 320 U.S. 810, 100.

McLaughlin v. *Florida,* 379 U.S. 184, 191–92 (1964). Thus, the Court held that the proper test to apply in that case was "whether there *clearly appears* in the relevant materials some *overriding* statutory purpose *requiring* the proscription of the specified conduct when engaged in by a white and a Negro, but not otherwise." *Id.* at 192 [emphasis added]. To the further argument that the Florida statute should be upheld because ancillary to and serving the same purpose as an anti-miscegenation statute presumed valid for the purpose of the case, the Court replied:

> There is involved here an exercise of the state police power which trenches upon the constitutionally protected freedom from invidious official discrimination based on race. Such a law, even though enacted pursuant to a valid state interest, bears a heavy burden of justification, as we have said, and will be upheld only if it is

> *necessary,* and not merely rationally related, to the accomplishment of a permissible state policy. *Id.* at 196 [emphasis added].

There were no dissents in the *McLaughlin* case. The two concurring opinions serve to underline and buttress the test applied by the majority. Justice Harlan, joining the Court's opinion, added:

> I agree with the Court * * * that necessity, not mere reasonable relationship, is the proper test, see *ante,* pp. 195–196. *NAACP* v. *Alabama,* 377 U.S. 288, 307–308; *Saia* v. *New York,* 334 U.S. 558, 562; *Martin* v. *Struthers,* 319 U.S. 141, 147; *Thornhill* v. *Alabama,* 310 U.S. 88, 96; *Schneider* v. *State,* 308 U.S. 147, 161, 162, 164; see *McGowan* v. *Maryland,* 366 U.S. 420, 466–467 (Frankfurter, J., concurring).
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> The fact that these cases arose under the principles of the First Amendment does not make them inapplicable here. Principles of free speech are carried to the States only through the Fourteenth Amendment. The necessity test which developed to protect free speech against state infringement should be equally applicable in a case involving state racial discrimination—prohibition of which lies at the very heart of the Fourteenth Amendment.

Id. at 197. Justice Stewart, speaking for himself and Justice Douglas, expressed the view that the majority's test did not go far enough as applied to a *criminal* statute because no overriding state purpose *could* exist.

> * * * I cannot conceive of a valid legislative purpose under our Constitution for a state law which makes the color of a person's skin the test of whether his conduct is a criminal offense. * * * I think it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor.

Id. at 198.

Three years later the Court dealt with a Virginia statute prohibiting interracial marriages. The statute was determined to be unconstitutional under the *McLaughlin* test, expressed here in these terms:

> At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny," *Korematsu* v. *United States,* 323 U.S. 214, 216 (1944), and, if they are *ever* to be upheld, they must be shown to be *necessary* to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. * * *
>
> There is patently no legitimate *overriding* purpose independent of invidious racial discrimination which justifies this classification.

Loving v. *Virginia,* 388 U.S. 1, 11 (1967) [emphasis added]. Justice Stewart filed a separate concurring opinion—reiterating his belief that there could never be a sufficiently compelling state purpose to justify a criminal statute based on racial classification. *Id.* at 13.

Although *McLaughlin* and *Loving* dealt with criminal statutes and express racial classifications, numerous lower court decisions apply the strict "compelling" or "overriding" purpose standard in the civil area as well as the criminal, and extend its application to facially neutral state action which, in reality, is racially discriminatory in its effect. The definitive case is *Jackson* v. *Godwin,* 400 F. 2d 529 (5th Cir. 1968), in which Judge Tuttle meticulously and exhaustively examines the lower court cases, including those "which have struck down rules and regulations which on their face appear to be non-discriminatory but which *in practice and effect,* if not purposeful design, impose a

heavy burden on Negroes and not on whites, and operate in a racially discriminatory manner." *Id.* at 538–39 [emphasis added]. He concludes his analysis with this formulation of the constitutional standard:

> In both the areas of racial classification and discrimination and First Amendment freedoms, we have pointed out that stringent standards are to be applied to governmental restrictions in these areas, and rigid scrutiny must be brought to bear on the justifications for encroachments on such rights. The State must strongly show some substantial and controlling interest which requires the subordination or limitation of these important constitutional rights, and which justifies their infringement, [citations]; and in the absence of such compelling justification the state restrictions are impermissible infringements of these fundamental and preferred rights. *Id.* at 541.

The most recent application of the "compelling and overriding state interest" test is to be found in the Fifth Circuit's decision in *Hawkins* v. *Town of Shaw,* F. 2d (5th Cir. 1971). The plaintiffs, Negro residents of Shaw, Mississippi, alleged racial discrimination by town officials in the provision of various municipal services. The District Court dismissed the complaint, applying a test akin to that used by the majority in this case: "If actions of public officials are shown to have rested upon rational considerations, irrespective of race or poverty, they are not within the condemnation of the Fourteenth Amendment, and may not be properly condemned upon judicial review." *Hawkins* v. *Town of Shaw,* 303 F. Supp. 1162, 1168 (N.D. Miss. 1969). The Fifth Circuit reversed, pointing to the standard set forth in *Jackson* v. *Godwin, supra,* and stating, "In applying this test, defendants' actions may be justified only if they show a compel-

ling state interest." *Hawkins* v. *Town of Shaw*, F. 2d (5th Cir. 1971) (slip opinion at 3).

In *Hawkins* the Fifth Circuit specifically considered the relevance of the defendant's "intent," or "purpose" as the majority in our case would label it. Conceding that "the record contains no direct evidence aimed at establishing bad faith, ill will or an evil motive on the part of the Town of Shaw and its public officials," *Id.* at (slip opinion at 12), the court held: "Having determined that no compelling state interests can possibly justify the discriminatory *results* of Shaw's administration of municipal services, we conclude that a violation of equal protection has occurred." *Id.* at (slip opinion at 13) [emphasis in original text].

Just as Shaw's administration of municipal services violates the constitutional guarantee of equal protection, so too does the creation of the new Scotland Neck School District.[8] The challenged legislation carves an enclave, 57% white and 43% black, from a previously 22% white and 77% black school system.[9] No compelling or overriding state interest justifies the new district, and its formation has a racially discriminatory effect by allowing the white residents of Scotland Neck to shift their children from a school district where they are part of a 22% minority to one where they constitute a 57% majority.

The prevailing opinion draws comfort from the fact that the new school district, because all children in the same grade will attend the same school, will be "integrated throughout." I dare say a 100% white

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[8] Since even the majority concedes that the Littleton-Lake Gaston School District must be enjoined as a racially discriminatory scheme in violation of the Fourteenth Amendment, I do not discus the facts of that case.

[9] One percent of the pupils in Halifax County are Indians.

school district would also be "integrated throughout." The relevant question is what *change* in degree of integration has been effected by the creation of the new district. Here the change is an increase in the percentage of white pupils from 22% to 57%. The Constitution will no more tolerate measures establishing a ratio of whites to blacks which the whites find *more* acceptable than it will measures totally segregating whites from blacks. The 35% shift here is no less discriminatory because it is a shift from 22% to 57% than if it were one from 65% to 100%.[10]

The majority opinion makes the puzzling concession that:

> If the effect of this act was the continuance of a dual school system in Halifax County or the establishment of a dual system in Scotland Neck it would not withstand challenge under the equal protection clause, but we have concluded that it does not have that effect.

The situation here is that the Act sets up in Halifax County two school systems, one with a 50:43 white to black ratio and the other with a 19:80 white to black ratio, in place of one school system with a 22:77 white to black ratio. Thus, the Act constructs a dual school system in Halifax County by the simple expedient of labeling the two sets of schools as separate districts. The majority does not explain

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[10] Judge Winter properly emphasizes in his separate opinion that the effect of the new school districts must be measured by comparing "the racial balance in the preexisting unit with that in the new unit sought to be created, and that remaining in the preexisting unit after the new unit's creation." Focusing, as do I, on the 35% increase in the white student population of the new Scotland Neck School District, he quite correctly notes that "[a] more flagrant example of the creation of a white haven, or a more nearly white haven, would be difficult to imagine."

why the Act can *create* a dual school system in Halifax County if it could not *continue* a dual system there. Nor do they explain why the Act can *establish* a dual school system in Halifax County if it could not *establish* one in Scotland Neck. Obviously no explanation is possible and the legislation severing the Scotland Neck School District fails to meet the test of the equal protection clause.

II

Even if I accepted the majority's formulation as the proper doctrine to control these cases, which I certainly do not, I think their test is misapplied in *Scotland Neck*. The court accepts at face value the defendants' assertions that local control and increased taxation were the dominant objectives to be fulfilled by the new district, with the ultimate goal of providing quality education to the students of Scotland Neck. The facts plainly are to the contrary and demonstrate that, in projecting the new district, race was the primary consideration. The District Court specifically found that a significant factor in the creation of the new school district was

> a desire on the part of the leaders of Scotland Neck to preserve a ratio of black to white students in the schools of Scotland Neck that would be acceptable to white parents and thereby prevent the flight of white students to the increasingly popular all-white private schools in the area.

United States v. *Halifax County Board of Education*, 314 F. Supp. 65, 72 (E.D.N.C. 1970). The defendants do not contest this finding.[11]

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[11] The defendants assert instead that the prevention of white flight is a legitimate goal. However, the Supreme Court in

What starkly exposes the true purpose impelling the redistricting adventure and belies the professions of lofty objectives is the transfer plan initially adopted by the Scotland Neck City Board of Education.[12] Under that plan, parents residing within Halifax County but outside the newly fashioned district could place their children in the Scotland Neck Schools by paying a fee ranging from $100 to $125. The use of transfer plans of this nature as devices to thwart the mandate of *Brown* v. *Board of Education, supra,* has not been uncommon,[13] and the majority here has no difficulty in recognizing that the Scotland Neck transfer plan was a contrivance to perpetuate segregation. Initial applications for transfer under the plan were received from 350 white and only 10 black children in Halifax County. The net result would have been a racial mix of 74% white, 26% black in the Scotland Neck School District, contrasting with 82% black, 17% white, 1% Indian, in the rest of Halifax County.

Monroe v. *Board of Commissioners*, 391 U.S. 450, 459 (1968), has directly addressed itself to this argument, and rejected it out of hand: "We are frankly told in the Brief that without the transfer option it is apprehended that white students will flee the school system altogether. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." *Brown II*, at 300.

See also Brunson v. *Board of Trustees of School District No. 1 of Clarendon County*, 429 F. 2d 820 (4th Cir. 1970); *Anthony* v. *Marshal County Board of Education*, 409 F. 2d 1287 (5th Cir. 1969). The defendants' candid admission serves only to emphasize the dominant racial considerations behind the whole scheme.

[12] Although the School Board later abandoned the transfer plan, its initial adoption nevertheless reflects the Board's intentions.

[13] *See Monroe* v. *Board of Commissioners*, 391 U.S. 450 (1968); *Gross* v. *Board of Education*, 373 U.S. 683 (1963).

Thus the transfer plan would have operated directly contrary to the obligation to desegregate the schools of Halifax County and distinctly evidences the design of the Scotland Neck School Board to bring into existence a white haven.

Curiously enough, despite its condemnation of the transfer plan, the court declares the plan not relevant in assessing the intent of the North Carolina legislature in enacting Chapter 31, since there is no evidence in the record to show that the legislative body knew a transfer plan would be effected. This reasoning is fallacious for legislators are not so naive and, in any event, are chargeable with the same motivations as the local communities concerned. The relevant inquiry under the majority's test is into the purposes for which state action was taken and, as Judge Winter observes in his separate opinion, when dealing with statutes designed to affect local communities, one must look to the localities to determine the purposes prompting the legislation.[14]

The size of the new school district in Scotland Neck is also a crucial factor to be taken into account in judging the genuineness of the alleged goal of quality education. The Report of the Governor's Study Commission on the Public School System of North Carolina favors the *consolidation* of school districts to increase efficiency in the operations of the public schools,

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[14] Moreover, as the District Court noted, local newspapers, including the *Raleigh News and Observer*, suggested that racial considerations, and not a concern for better educational, motivated the legislation. For example, on February 14, 1969, a month before Chapter 31 was enacted, the *Raleigh News and Observer* commented editorially that the bill provided for an "educational island" dominated by whites and on February 22, 1969, suggested that if the bill passed, it would encourage other school districts to resort to similar legislation.

and suggests 9,000–10,000 as a desirable pupil population, with 3,500 to 4,000 as a minimum. Scotland Neck's minuscule new school district for 695 pupils—one fifth of the suggested minimum—is an anomaly that runs directly counter to the recommendation of the Study Commission that schools be merged into larger administrative units. Moreover, if quality education were the true objective and Scotland Neck residents were deeply concerned with increasing revenue to improve their schools, one might have expected that in-depth consideration would have been given to the financial and educational implications of the new district. However, the District Court found that:

> [t]here were no studies made prior to the introduction of the bill with respect to the educational advantages of the new district, and there was no actual planning as to how the supplement would be spent although some people assumed it would be spent on teachers' supplements.

United States v. *Halifax County Board of Education*, 314 F. Supp. at 74.

Also highly relevant in assessing the dominant purpose is the timing of the legislation splintering the Halifax County school system. During the 1967–68 school year the Halifax County School District maintained racially identifiable schools, and only 46 of the 875 students attending the Scotland Neck school were black. The next school year, under prodding by the Department of Justice, the Halifax County Board of Education assigned to the Scotland Neck school the entire seventh and eighth grades from an adjacent all-black county school, and promised to desegregate completely by 1969–70. A survey by the North Carolina State Department of Education in December 1968 recommended an integration plan which provided that

690 black and 325 white students should attend the Scotland Neck school. It was only then that the bill which later became Chapter 31 was introduced in the General Assembly of North Carolina in 1969. The fact that the Scotland Neck School District was not formed until the prospects for a unitary school system in Halifax County became imminent leads unmistakably to the conclusion that race was the dominant consideration and that the goal was to achieve a degree of racial apartheid more congenial to the white community.[15]

III

The court's incongruous holdings in these two cases, reversing the District Court in *Scotland Neck*, while affirming in the twin case, *Littleton-Lake Gaston*, cannot be reconciled. The uncontested statistics presented in *Scotland Neck* speak even louder in terms of race than the comparable figures for *Littleton-Lake Gaston*. The white community in Scotland Neck has sliced out a predominantly white school system from an overwhelmingly black school district. By contrast, the white community in Littleton-Lake Gaston was more restrained, gerrymandering a 46% white, 54% black, school unit from a county school system that was 27% white, 67% black.[16] The majority attempts to escape the inevitable implications of these statistics by attributing to the North Carolina legislature, which severed the Scotland Neck School District on March 3, 1969, benevolent motivation and obliviousness to the

[15] It is also noteworthy that while the Scotland Neck community claims that it had not been accorded a fair allocation of county school funds over a period of years, this apparently became intolerable only when the Department of Justice exerted pressure for immediate action to effectuate integration.

[16] Six percent of the pupils in Warren County are Indian.

racial objectives of the local white community. Yet the majority unhesitatingly finds a discriminatory purpose in the similar excision of the new Littleton-Lake Gaston School District by the same legislators only one month later, on April 11, 1969. The earlier statute no less than the later provided a refuge for white students and maximized preservation of segregated schools. The record and the District Court's opinion in *Scotland Neck,* no less than the record and the opinion in *Littleton-Lake Gaston,* are replete with evidence of discriminatory motivations. On their facts the two cases are as alike as two peas in a pod.

Judge Bryan soundly recognizes the discordance in the two holdings of the majority. The resolution he proposes is to reverse in both cases. This would indeed cure the inconformity, but at the cost of compounding the error. The correction called for lies in the opposite direction—affirmance in both cases.

IV

If, as the majority directs, federal courts in this circuit are to speculate about the interplay and the relative influence of divers motives in the molding of separate school districts out of an existing district, they will be trapped in a quagmire of litigation. The doctrine formulated by the court is ill-conceived, and surely will impede and frustrate prospects for successful desegregation. Whites in counties heavily populated by blacks will be encouraged to set up, under one guise or another, independent school districts in areas that are or can be made predominantly white.

It is simply no answer to a charge of racial discrimination to say that it is designed to achieve "quality education." Where the effect of a new school district is to create a sanctuary for white students, for which

no compelling and overriding justification can be offered, the courts should perform their constitutional duty and enjoin the plan, notwithstanding professed benign objectives.

Racial peace and the good order and stability of our society may depend more than some realize on a convincing demonstration by our courts that true equality and nothing less is precisely what we mean by our proclaimed ideal of "the equal protection of the laws." The palpable evasions portrayed in this series of cases should be firmly condemned and enjoined. Such examples of racial inequities do not go unheeded by the adversely affected group. They are noted and resented. The humiliations inflicted by such cynical maneuvers feed the fires of hostility and aggravate the problem of maintaining peaceful race relations in the land. In this connection it is timely to bear in mind the admonition of the elder Mr. Justice Harlan, dissenting in *Plessy* v. *Ferguson,* 163 U.S. 537, 560 (1896):

> The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law.

I dissent from the reversal in Nos. 14929 and 14930, *United States* v. *Scotland Neck City Board of Education,* — F. 2d — (4th Cir. 1971), and concur in the affirmance in No. 14990, *Turner* v. *Littleton-Lake Gaston School District,* — F. 2d — (4th Cir. 1971).

ALBERT V. BRYAN, *Circuit Judge,* dissenting: For me there is here no warrant for a decision different from the *Scotland Neck* and *Emporia* deter-

minations. This conclusion derives from the majority's exposition of the fact parallel of these cases with the circumstances of *Littleton-Lake Gaston*. The identicalness irresistibly argues a like disposition—reversal of the judgment on appeal.

WINTER, *Circuit Judge*, dissenting and concurring specially: I dissent from the majority's opinion and conclusion in No. 14,552, *Wright* v. *Council of City of Emporia*, — F. 2d — (4 Cir. 1971), and in Nos. 14929 and 14930, *United States* v. *Scotland Neck City Board of Education*, — F. 2d — (4 Cir. 1971). I concur in the judgment in No. 14990, *Turner* v. *Littleton-Lake Gaston School District*, — F. 2d — (4 Cir. 1971), and I can accept much of what is said in the majority's opinion. There is, however, a broader basis of decision than that employed by the majority on which I would prefer to rest.

Because the majority makes the decision in *Emporia* the basis of decision in *Scotland Neck* and distinguishes them from *Littleton-Lake Gaston*, I will discuss the cases in that order. I would conclude that the cases are indistinguishable, as does my Brother Bryan, although I would also conclude that each was decided correctly by the district court and that in each we should enjoin the carving out of a new school district because it is simply another device to blunt and to escape the ultimate reach of *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and subsequent cases.

I

While the legal problem presented by these cases is a novel one in this circuit, I think the applicable legal standard is found in the opinion of the Supreme Court in Green v. County School Board of New Kent

County, 391 U.S. 430 (1968). In rejecting a "freedom of choice" plan under the circumstances presented there, the Court articulated the duties of both a school board and a district court in implementing the mandate of *Brown*:

> The burden on a school board today is to come forward with a plan that promises realistically to work, *and promises realistically to work now.*
>
> * * * * *
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> Where the court finds the board to be acting in good faith and the proposed plan to have real prospects for dismantling the state-imposed dual system *"at the earliest possible date,"* then the plan may be said to provide effective relief. Of course, the availability to the board of other more promising courses of action may indicate a lack of good faith; *and at the least it places a heavy burden upon the board to explain its preference for an apparently less effective method.* [emphasis added.]

391 U.S. at 439.

In each of the instant cases, following a protracted period of litigation, a plan designed finally to institute a unitary school system was jeopardized by the attempt of a portion of the existing school district to break away and establish its own schools. I think the advocates of such a subdivision bear the "heavy burden" of persuasion referred to in *Green* because, as in that case, the dominant feature of these cases is the last-minute proposal of an alternative to an existing and workable integration plan. Factually, these cases are not significantly dissimilar from *Green*. Each act of secession would necessarily require the submission and approval of new integration plans for the newly-created districts, and thus each is tantamount to the proposal of a new plan. And while the act giving rise to the alternative approach here is

state legislation rather than a proposal of the local school board, the fact remains that the moving force in the passage of each piece of legislation [1] was of local origin. Few who have had legislative experience would deny that local legislation is enacted as a result of local desire and pressure. It is, therefore, to local activities that one must look to determine legislative intent.

Application of the "heavy burden" standard of *Green* to the instant cases is also supported by considerations of policy. In an area in which historically there was a dual system of schools and at best grudging compliance with *Brown,* we cannot be too careful to search out and to quash devices, artifices and techniques furthered to avoid and to postpone full compliance with *Brown.* We must be assiduous in detecting racial bias masking under the guise of quality education or any other benevolent purpose. Especially must we be alert to ferret out the establishment of a white haven, or a relatively white haven, in an area in which the transition from racially identifiable schools to a unitary system has proceeded slowly and largely unwillingly, where its purpose is at least in part to be a white haven. Once a unitary system has been established and accepted, greater latitude in redefinition of school districts may then be permitted.

Given the application of the *Green* rationale, the remaining task in each of these cases is to discern whether the proposed subdivision will have negative effects on the integration process in each area, and, if so, whether its advocates have borne the "heavy burden" of persuasion imposed by *Green.*

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[1] In *Emporia*, the implementing legislation for the separation already existed; however, the local people alone made the choice to exercise the option which the statute provided.

II

EMPORIA SCHOOL DISTRICT

The City of Emporia, located within the borders of Greensville County, Virginia, became a city of the second class on July 31, 1967, pursuant to a statutory procedure dating back to the 19th Century. While it had the state-created right at that time to establish its own school district, it chose instead to remain within the Greensville County system until June, 1969. It is significant that earlier in this same month, more than a year after it had invalidated a "freedom of choice" plan for the Greensville County system, the district court ordered into effect a "pairing" plan for the county as a further step toward full compliance with *Brown* and its progeny.

The record amply supports the conclusion that the creation of a new school district for the City of Emporia would, in terms of implementing the principles of *Brown,* be "less effective" than the existing "pairing" plan for the county system. In the first place, the delay involved in establishing new plans for the two new districts cannot be minimized in light of the Supreme Court's statement in *Green* that appropriate and effective steps must be taken at once. See also *Carter* v. *West Feliciana School Board,* 396 U.S. 290 (1970); *Alexander* v. *Holmes County Bd. of Ed.,* 396 U.S. 19 (1969). Secondly, as the district court found, the separation of Emporia from Greensville County would have a substantial impact on the racial balance both within the county and within the city. Within the entire county, there are 3,759 students in a racial ratio of 34.1% white and 65.9% black. Within the city there are 1,123 students, 48.3% of whom are white and 51.7% are black. If the city is permitted to establish

its own school system, the racial ratio in the remainder of the county will change to 27.8% white and 72.2% black.[2] To me the crucial element in this shift is not that the 48.3%–51.7% white to black ratio in the town does not constitute the town a white island in an otherwise heavily black county and that a shift of 6% in the percentage of black students remaining in the county is not unacceptably large. Whenever a school area in which racial separation has been a historical fact is subdivided, one must compare the racial balance in the preexisting unit with that in the new unit sought to be created, and that remaining in the preexisting unit after the new unit's creation. A substantial shift in any comparable balances should be cause for deep concern. In this case the white racial percentage in the new unit will increase from 27.8% to 48.3%. To allow the creation of a substantially whiter haven in the midst of a small and heavily black area is a step backward in the integration process.

And finally, the subdivision of the Greensville County school district is "less effective" in terms of the principles of *Brown* because of the adverse psychological effects on the black students in the county which will be occasioned by the secession of a large portion of the more affluent white population from the county schools. If the establishment of an Emporia school district is not enjoined, the black students in

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[2] As part of the establishment of the new system, the Emporia school board proposed a transfer plan whereby Emporia will accept county students upon payment of tuition. The record does not contain any projection of the number of county students who would avail themselves of the plan although in argument counsel was candid in stating that only white parents would be financially able to exercise the option. The transfer plan was quickly abandoned when it became apparent that it might not earn the approval of the district court.

the county will watch as nearly one-half the total number of white students in the county abandon the county schools for a substantially whiter system. It should not be forgotten that psychological factors, and their resultant effects on educational achievement, were a major consideration in the Supreme Court's opinion in *Brown*.

In my mind, the arguments advanced by the residents of Emporia in support of their secession from the county school system do not sustain the "heavy burden" imposed by *Green*. The essence of their position is that, by establishing their own schools over which they will exercise the controlling influence, they will be able to improve the quality of their children's education. They point to a town commitment to such a goal and, in particular, to a plan to increase educational revenues through increased local taxation. They also indicate that they presently have very little voice in the management of the county school system. Although, as the district court found, the existence of these motives is not to be doubted, I find them insufficient in considering the totality of the circumstances.

While the district court found that educational considerations were *a* motive for the decision to separate, it also found that "race was a factor in the city's decision to secede." Considering the timing of the decision in relation to the ordering into effect of the "pairing" plan, as well as the initial proposal of a transfer plan, this finding is unassailable. *Green* indicates that the absence of good faith is an important consideration in determining whether to accept a less effective alternative to an existing plan of integration. The lack of good faith is obvious here.

When the educational values which the residents of Emporia hope to achieve are studied, it appears that the secession will have many deleterious consequences.

As found by the district court, the high school in the city will be of less than optimum size. County pupils will be cut off from exposure to a more urban society. The remaining county system will be deprived of leadership ability formerly derived from the city. It will suffer from loss of the city's financial support, and it may lose teachers who reside in the city. To me, these consequences, coupled with the existence of the racial motive, more than offset the arguments advanced by the residents of Emporia. The separation, with its negative effects on the implementation of the principles of *Brown,* should be enjoined.

III

SCOTLAND NECK SCHOOL DISTRICT

As the majority's opinion recites, the history of resistance to school desegregation in the Halifax County school system parallels the history of the attempts on the part of the residents of Scotland Neck to obtain a separate school district. The significant fact is that in spite of otherwise apparently cogent arguments to justify a separate system, the separate system goal was not realized until, as the result of pressure from the United States Department of Justice, the Halifax County Board agreed to transfer the seventh and eighth grade black students from the previously all-black Brawley School, outside the city limits of Scotland Neck, to the Scotland Neck School, previously all-white. Chapter 31 followed thereafter as soon as the North Carolina legislature met. It is significant also that the Halifax County Board reneged on its agreement with the Department of Justice shortly before the enactment of Chapter 31.

The same negative effects on achieving integration which are present in the Emporia secession are present

here. Although the City of Scotland Neck has already submitted a plan for its school district, delay will result in devising such a plan for the remaining portion of Halifax County. The racial balance figures show that the existing county system has 8,196 (77%) black students, 2,357 (22%) white students, and 102 (1%) Indian students. Within the city system, there would be 399 (57.4%) white and 296 (42.6%) black, while the remaining county system would be comprised of 7,900 (80%) black, 1,958 (19%) white and 102 (1%) Indian. The difference between the percentage of white students within the existing system and the newly-created one for Scotland Neck is thus 35%. A more flagrant example of the creation of a white haven, or a more nearly white haven, would be difficult to imagine. The psychological effects on the black students cannot be overestimated.

The arguments advanced on behalf of Scotland Neck are likewise insufficient to sustain the burden imposed by *Green*. Even if it is conceded that one purpose for the separation was the local desire to improve the educational quality of the Scotland Neck schools, the record supports the conclusion of the district court that race was a major factor. If the basic purpose of Chapter 31 could not be inferred from the correlation of events concerning integration litigation and the attempt to secede, other facts make it transparent. As part of its initial plan to establish a separate system, Scotland Neck proposed to accept transfer students from outside the corporate limits of the city on a tuition basis. Under this transfer system, the racial balance in the Scotland Neck area was 749 (74%) white to 262 (26%) black, and the racial balance in the rest of Halifax County became 7,934 (82%) black, 1,608 (17%) white, and 102

(1%) Indian.[3] This proposal has not yet been finally abandoned. In oral argument before us, counsel would not tell us forthrightly that this would not be done, but rather, equivocally indicated that the proposal would be revived if we, or the district court, could be persuaded to approve it. I cannot so neatly compartmentalize Chapter 31 and the transfer plan as does the majority, and conclude that one has no relevance to the other. To me, what was proposed, and still may be attempted, by those who provided the motivation for the enactment of Chapter 31 is persuasive evidence of what Chapter 31 was intended to accomplish.

In terms of educational values, the separation of Scotland Neck has serious adverse effects. Because Scotland Neck, within its corporate boundaries, lacked sufficient facilities even to operate a system to accommodate the only 695 pupils to be educated, it purchased a junior high school from Halifax County. This school is located outside of the corporate boundaries of Scotland Neck. The sale deprives the students of Halifax County, outside of Scotland Neck of a school facility. The record contains abundant, persuasive evidence that the best educational policy and the nearly unanimous opinion of professional educa-

[3] There is apparent error in the computations made by the district court in this regard. The district court found that the net effect of the transfer plan would be to add 350 white students to the city system. Added to the resident white students (399), the total is 749, not 759 as indicated in the opinion of the district court. The district court's figure of 262 black students in the city under the transfer plan (a net loss of 34) appears correct. But when these two totals are subtracted from the figures given for the existing county system in 1968–1969 (2,357 white, 8,196 black and 102 Indian), the effects on the county are as shown above.

tors runs contrary to the creation of a small, separate school district for Scotland Neck. A study by the State of North Carolina indicates that a minimally acceptable district has 3,500–4,000 pupils.

On the facts I cannot find the citizens of Scotland Neck motivated by the benign purpose of providing additional funds for their schools; patently they seek to blunt the mandate of *Brown*. Even if additional financial support for schools was a substantial motive, the short answer is that a community should not be permitted to buy its way out of *Brown*. Here again, the "heavy burden" imposed by *Green* has not been sustained.

IV

LITTLETON-LAKE GASTON SCHOOL DISTRICT

The majority's opinion correctly and adequately discloses the legislative response to court-ordered compliance with *Brown* and its progeny. That response was the creation of the Warrenton City School District and the Littleon-Lake Gaston School District. The overall effect of the creation of the Littleton-Lake Gaston district, the proposed tuition transfer plan, and the creation of the Warrenton City district (an act enjoined by the district court and not before us) would be to permit more than 4 out of 5 white students to escape the heavily black schools of Warren County. Even without the transfer plan, the racial balance in the Littleton-Lake Gaston district would show nearly 20% more white students than in the existing Warren County unit. To permit the subdivision would be to condone a devastating blow to the progress of school integration in this area.

Despite the assertion of the benign motives of remedying long-standing financial inequities and the

preservation of local schools, I agree with the majority that the "primary" purpose and effect of the legislation creating the Littleton-Lake Gaston school district was to carve out a refuge for white students and to preserve to the fullest possible extent segregated schools. Aside from questions of motivation, the record shows that the new district was established to accommodate a total of only 659 students, despite state policy to the contrary and expert opinion that its small size rendered it educationally not feasible. And, as the majority indicates, there is no evidence that the residents of the Littleton area have been deprived of their proportionate voice in the operation of the schools of Warren County. In short, there is a complete absence of persuasive argument in favor of the creation of the new district.

While I agree that the injunction should stand, I disagree that injunctive relief should be granted only when racial motivation was the "primary" motive for the creation of the new district. Consistent with *Green*, we should adopt the test urged by the government in *Scotland Neck*, i.e., to view the results of the severance as if it were a part of a desegregation plan for the original system—that is, to determine whether the establishment of a new district would, in some way, have an adverse impact on the desegregation of the overall system. By this test the injunction would stand in the *Littleton-Lake Gaston* case, as well as in each of the two other cases, because in each of the three there is at least some racial motivation for the separation and some not insubstantial alteration of racial ratios, some inherent delay in achieving an immediate unitary system in all of the component parts, and an absence of compelling justification for what is sought to be accomplished.

BUTZNER, *Circuit Judge:* This appeal involves the same case in which I decided questions concerning the school board's compliance with the Fourteenth Amendment when I served on the district court.* While the details differ, the same basic issues remain—the validity of measures taken to disestablish a dual school system, to create a unitary system, and to assign pupils and faculty to achieve these ends.

> Title 28 U.S.C. § 47 provides: "No judge shall hear or determine an appeal from the decision of a case or issue tried by him."

Recently, Judge Craven carefully examined this statute and the cases and authorities which cast light on it. He concluded that he should not sit on an appeal of a case in which he had participated as a district judge when the ultimate questions were the same: "what may a school board be compelled to do to dismantle a dual system and implement a unitary one, or how much school board action is enough?" See Swann v. Charlotte-Mecklenburg Bd. of Ed., 431 F. 2d 135, (4th Cir. 1970). Following the sound precedent established by Judge Craven, I believe that I must disqualify myself from participating in this appeal.

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* See *Wright* v. *County School Bd. of Greensville County, Va.*, 252 F. Supp. 378 (E.D. Va. 1966). Two other opinions were not published.

APPENDIX C

[Filed August 25, 1969, Samuel A. Howard, Clerk, U.S. District Court, E. Dist. No. Car.]

In the United States District Court for the Eastern District of North Carolina, Wilson Division

No. 1128—Civil

UNITED STATES OF AMERICA, PLAINTIFF

v.

HALIFAX COUNTY BOARD OF EDUCATION, A BODY CORPORATE; FERD L. HARRISON, AS MAYOR OF THE TOWN OF SCOTLAND NECK; J. A. ANDREWS, F. G. SHEARIN, AND J. I. WALSTON, D. E. JOSEY, JR., AS MEMBERS OF THE BOARD OF COMMISSIONERS OF THE TOWN OF SCOTLAND NECK; THE TOWN OF SCOTLAND NECK, A BODY CORPORATE; AND THE SCOTLAND NECK CITY BOARD OF EDUCATION, A BODY CORPORATE, DEFENDANTS

ORDER

LARKINS, *District Judge:* This cause coming on to be heard before the Court on a motion for a preliminary injunction filed by the plaintiff pursuant to the provisions of Sections 407 (a) and (b) of the Civil Rights Act of 1964, as codified, 42 U.S.C.A. §§ 2000c–6 (a) and (b) seeking to restrain the defendants from giving any force or effect to the provisions of Chapter 31 of the North Carolina Session Laws of 1969, an Act to establish a separate administrative unit for the operation of the public schools of the Town of Scotland Neck, North Carolina; and due

notice having been given to the defendants: and the Court having considered the evidence and the argument of counsel and being fully advised in the premises and it appearing to the Court that effectuation of the terms of the Act will result in the operation of the schools of Scotland Neck, North Carolina, and Halifax County, North Carolina, a racially discriminatory basis to the irreparable damage of the United States and the Negro pupils of Halifax County; and it further appearing to the Court that no injunctive relief as to effectuation of the provisions of Chapter 31 is being sought against the defendant Halifax County Board of Education; and that the defendants Ferd L. Harrison, as Mayor of the Town of Scotland Neck, J. A. Andrews, F. G. Shearin, J. I. Walston, D. E. Josey, Jr., as members of the Board of Commissioners of the Town of Scotland Neck, and the Town of Scotland Neck, a body corporate, are not proper parties to this action;

It is, therfore, ORDERED, ADJUDGED and DECREED:

THAT the motion to dismiss filed on behalf of the defendants Ferd L. Harrison, as Mayor of the Town of Scotland Neck, J. A. Andrews, F. G. Shearin, J. I. Walston, D. E. Josey, Jr., as members of the Board of Commissioners of the Town of Scotland Neck, and the Town of Scotland Neck, a body corporate, be, and the same hereby is allowed; and

THAT the defendant Scotland Neck City Board of Education and its officers, agents, employees and successors are hereby enjoined from giving any force or effect to the provisions of Chapter 31 and from taking any action pursuant to the provisions of Chapter 31 pending a final determination on the merits of the issues raised in the present action; and

THAT pursuant to the provisions of Rule 65(c) of the Federal Rules of Civil Procedure, no security shall

be required of the plaintiff, United States of America; and

THAT this ORDER shall become effective as of 12:00 Noon on Monday, August 25, 1969; and

THAT a Memorandum Opinion subsequently will be filed in this action; and

THAT the Clerk shall serve copies of this ORDER upon all counsel of record, and the defendants.

Let this ORDER be entered forthwith.

JOHN D. LARKINS, JR.,
United States District Judge.
ALGERNON L. BUTLER,
United States District Judge.

RALEIGH, NORTH CAROLINA, *August 25, 1969.*

[Filed, August 25, 1969, Samuel A. Howard, Clerk, U.S. District Court, E. Dist. No. Car.]

In the United States District Court for the Eastern District of North Carolina, Wilson Division

No. 1128—Civil

UNITED STATES OF AMERICA, PLAINTIFF

v.

HALIFAX COUNTY BOARD OF EDUCATION, A BODY CORPORATE, AND THE SCOTLAND NECK CITY BOARD OF EDUCATION, A BODY CORPORATE, DEFENDANTS

MEMORANDUM OPINION

LARKINS, *District Judge:* This Court entered its ORDER on August 25, 1969, effective at 12:00 noon. The Clerk served copies of said ORDER upon all defendants and counsel of record.

Pursuant to said ORDER this MEMORANDUM OPINION is filed in support of said ORDER and is included therein by reference.

This cause coming on to be heard before the United States District Judges for the Eastern District of North Carolina, and being heard upon the motions of plaintiffs and additional plaintiffs for a preliminary injunction and for a declaratory judgment; and due notice having been given to all defendants; and the Court having considered the evidence, the stipulations, the briefs and arguments of counsel, and being fully advised in the premises, makes the following:

FINDINGS OF FACT

1. On March 3, 1969, the General Assembly of North Carolina ratified a measure designated Chapter 31, Session Laws of North Carolina 1969, creating the Scotland Neck City Administrative Unit in Halifax County to operate the public schools in said unit; providing that all public school property located within the unit should become the property of the unit; providing for a supplemental tax levy, and directing a special election to authorize the establishment of said unit and the levying of said tax. The voters approved said proposals.

2. The Board of Education of the Scotland Neck City unit permits transfers of students in and out of said units. Scotland Neck City has established a tuition charge of $100.00 a year for the first child in a family, $25.00 for the second child, $25.00 for the third child, and each subsequent child per family free, for all students transferring into said unit.

3. During the school year 1968–69, all the public schools of Halifax County were operated by the Halifax County Board of Education. There was a

total of 10,655 students. The racial composition of the county school system was approximately as follows: White 2,357 (22%); Negro, 8,196 (78%), and Indian, 102.

4. The Scotland Neck City unit has approximately 695 *resident* students: White, 399 (57.4%); Negro, 296 (42.6%). The school facilities within the unit will accommodate approximately 1,000 students. Since the creation of the City unit under the 1969 Act, 350 Whites, and 10 Negroes have transferred from the county schools into the City unit; 44 Negroes in the eleventh and twelfth grades have transferred from the city to the Brawley High School in the county system. The net effect on the City unit for the school year 1969–70 is as follows: White, 759 (74%); Negro, 262 (26%).

5. The racial composition of the county school system as a result of the creation of the administrative unit, and taking into consideration the net effect of the transfers in and out of the systems, is as follows: White, 1,598 (17%); Negroes, 8,186 (83%); Indian, 102.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and of the subject matter of this proceeding.

2. Without determining the constitutionality of Chapter 31 of the 1969 Session Laws of North Carolina, the Act in its application creates a refuge for white students, and promotes segregated schools in Halifax County.

3. The Act impedes and defeats the Halifax County Board of Education from implementing its plan to completely desegregate all of the public schools in Halifax County by the opening of the school year 1969–70.

4. Unless the defendants are enjoined, the plaintiffs will suffer immediate and irreparable injury by the deprivation of their constitutional rights.

John D. Larkins, Jr.,
JOHN D. LARKINS, JR.,
United States District Judge.

RALEIGH, NORTH CAROLINA, *August 25, 1969.*

APPENDIX D

In the United States District Court for the Eastern District of North Carolina, Wilson Division No. 1128—Civil

[Filed, May 26, 1970, Samuel A. Howard, Clerk, U.S. District Court, E. Dist. No. Car.]

UNITED STATES OF AMERICA, (ORIGINAL) PLAINTIFF

v.

HALIFAX COUNTY BOARD OF EDUCATION, A BODY CORPORATE; FERD L. HARRISON, AS MAYOR OF THE TOWN OF SCOTLAND NECK; J. A. ANDREWS, F. G. SHEARIN, FRANK B. SHIELDS AND J. I. WALSTON, MEMBERS OF THE BOARD OF COMMISSIONERS OF THE TOWN OF SCOTLAND, NECK; AND THE TOWN OF SCOTLAND NECK, A PUBLIC BODY CORPORATE (ORIGINAL) DEFENDANTS

and

THE SCOTLAND NECK CITY BOARD OF EDUCATION, A BODY CORPORATE (ADDITIONAL) DEFENDANT

and

MARYETTA RICHARDSON AND HER INFANT CHILDREN MONTENIA, TIMMIE, CHARLOTTE AND JIMMY RICHARDSON (HALIWA INDIANS), ON BEHALF OF SEVERAL OTHER HUNDRED CITIZENS AND RESIDENTS OF HALIFAX COUNTY AND WARREN COUNTY, NORTH CAROLINA (ADDITIONAL) DEFENDANTS

and

ROBERT MORGAN, ATTORNEY GENERAL OF NORTH CAROLINA IN BEHALF OF THE STATE OF NORTH CAROLINA (ADDITIONAL) DEFENDANT

and

PATTIE BLACK COTTON, EDWARD M. FRANCIS, AND OTHERS (ADDITIONAL) PLAINTIFFS

and

MR. HENRY OVERMAN, SUPERINTENDENT OF HALIFAX COUNTY SCHOOLS; THE BOARD OF COMMISSIONERS OF HALIFAX COUNTY; SCOTLAND NECK CITY BOARD OF EDUCATION, FRANKLIN B. BAILEY, SUPERINTENDENT OF SCOTLAND NECK CITY SCHOOLS; LITTLETON-LAKE GASTON SCHOOL DISTRICT AND RUSSELL N. MANNING, SUPERINTENDENT OF LITTLETON-LAKE GASTON SCHOOL DISTRICT; AND THE NORTH CAROLINA STATE BOARD OF EDUCATION; AND DR. CRAIG PHILLIPS, NORTH CAROLINA STATE SUPERINTENDENT OF PUBLIC INSTRUCTION (ADDITIONAL) DEFENDANTS

OPINION AND ORDER

LARKINS, *District Judge:* The subject of this opinion and one of the primary issues in this case is the constitutionality of Chapter 31 of the North Carolina Session Laws of 1969,[1] a local act which

[1] Plaintiff, in its complaint, also challenged the constitutionality of defendant Halifax County Board of Education's pupil assignment plan on the grounds that the plan failed to establish a unitary non-racial school system as required by the mandate of the United States Supreme Court. Furthermore, the status of the Haliwa Indians in the new arrangement of school systems was raised by a complaint in intervention permitted to be filed by this Court on October 30, 1969, on behalf of the several hundred Haliwa Indians residing in Halifax and Warren Counties. Another third-party complaint in intervention,

carved out of the Halifax County, North Carolina, school system a separate administrative unit for the operation of the public schools in Scotland Neck, a town with a population of approximately 3000 located in the southeastern section of Halifax County. The plaintiff contends that the act is unconstitutional and that its implementation should be permanently enjoined because the act is inconsistent with the State's duty under the Equal Protection Clause of the Fourteenth Amendment to dismantle its dual school system. Defendants Scotland Neck City Board of Education and the State of North Carolina contend that the act is not violative of the Fourteenth Amendment to the United States Constitution as interpreted by the Supreme Court of the United States.

This controversy came before the court upon the filing of plaintiff's complaint on June 16, 1969, attacking the constitutionality of Chapter 31 of the Session Laws of 1969 and seeking to require the Halifax County Board of Education to desegregate its school system. Following a three-day hearing on plaintiff's motion for a preliminary injunction in Raleigh, North Carolina, this court, on August 25, 1969, entered a Memorandum Opinion and Order enjoining the Scotland Neck City Board of Education additional defendants and its officers and agents, etc., from taking any further action pursuant to the provisions of Chapter 31 pending a final determination on

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filed as of January 9, 1970, by order of this Court by two black public school teachers in Halifax County and a number of minor school children residing in the Scotland Neck City School System and the Littleton-Lake Gaston School System, made certain allegations about the treatment of black students and faculty members by the Halifax County Board of Education. None of the questions raised by these additional allegations have yet been ruled on by the Court.

the merits of the constitutional questions raised by plaintiff's challenge of the Act.

On October 30, 1969, this Court allowed certain named Haliwa Indians to intervene and on November 3, 1969, this court entered an Order allowing Robert B. Morgan, Attorney General of North Carolina, to intervene as a defendant on behalf of the State of North Carolina.

On January 9, 1970 the court allowed the motion for leave to intervene on behalf of Pattie Black Cotton, Edward M. Francis and others, and ordered additional defendants named therein to plead within 20 days.

This court scheduled a hearing on the merits of the constitutionality of Chapter 31 and similar questions in the case of *Turner et al.* v. *Warren County Board of Education et al.*, No. 1482, Raleigh Division, for Wednesday, December 17, 1969. A trial on the merits in this case and the *Turner et al.* v. *Warren County Board of Education et al.* case was conducted by this court on December 17 and 18, 1969. Following the trial, this court carefully considered the transcripts, exhibits, briefs, depositions and arguments of counsel; and, now being fully advised in the premises, the court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Scotland Neck, a small town with a present population of approximately 3,000, is located in the southeastern corner of Halifax County, a rural and agricultural region of North Carolina which has a predominantly black population. The population of the town itself is approximately 50% white and 50% black.

The schools within the corporate limits of Scotland Neck were operated as a city administrative unit

until 1936 at which time they became part of the Halifax County unit pursuant to a procedure authorized by the General Statutes of North Carolina.[2] The construction of the elementary school in 1903 and the high school in 1923 was financed entirely by local funds.

Following the consolidation with Halifax County in 1936, the schools of Scotland Neck were operated as part of a dual school system, completely segregated, until 1965, at which time the Halifax County Board of Education adopted a freedom-of-choice plan for the assignment of pupils. The county maintained the freedom-of-choice assignment plan for the next three years during which a few black students attended formerly all-white schools and no white students attended formerly all-black schools. For example, during the 1967–68 school year, all of the white students and 97% of the black students attended schools previously maintained for their own races. In that year, 10 of the 450 teachers in 18 schools were assigned across racial lines. About 35 black students attended the Scotland Neck schools during the 1967–68 school year.

On July 27, 1968, the United States Department of Justice, pursuant to its authority under Title IV of the Civil Rights Act of 1964, sent the Halifax County Board of Education a "notice letter" which advised that Halifax County had failed to disestablish its dual school system and that additional steps should be taken for the Board to be in compliance with the United States Supreme Court's decision in *Green* v. *School Board of New Kent County*, 391 U.S. 430, 88 S. Ct. 1689, 20 L. Ed. 2d 716 (1968). Negotiations ensued between the attorneys for the Justice Department and

[2] Formerly Article 18, Chapter 136, Public Laws 1923, now North Carolina General Statutes §§ 115–74 through 115–78.

the Halifax County School Board, and a tentative agreement was reached whereby the Board would disestablish the dual school system by the commencement of the 1969–70 school year and would implement certain intermediate steps at the beginning of the 1968–69 school year. The Justice Department agreed to withhold suit in consideration of the promises made by the Board.

The negotiations and the Board's promise to desegregate its schools were well-publicized in the local press. The newspaper in Scotland Neck reported on August 9, 1968, that the county had been ordered to end its dual school system and that there were several forms of grade organization, such as zoning or pairing of schools, which would be more effective than the freedom-of-choice plan as a means of converting to a unitary non-racial school system. The portion of the agreement which affected the Scotland Neck schools, that is, the proposed combining of the seventh and eighth grades of the previously all-black Brawley school, just outside the corporate limits of Scotland Neck, with the all-white junior high, was also publicized in the Scotland Neck newspaper on August 16, 1968.

On or about July 1, 1968, in anticipation of their obligation to comply with the *Green* decision, the Halifax County Board of Education asked the North Carolina Department of Public Instruction to conduct a school survey to determine the steps necessary for the Board to meet its desegregation obligations and to recommend "the most effective organizational patterns for the county schools in order to insure the best education possible for the children." The survey, prepared in response to the request, was completed in December 1968. It recommended as an Interim Plan a combination of geographic zoning with grade reorga-

nizations at some schools, including the pairing of the predominantly white Scotland Neck school and the all-black Brawley school with respect to certain grades. The Long Range plan suggested the construction of two new consolidated high schools to be financed by a proposed four million dollar bond issue. The survey also recommended that the county schools be consolidated with the schools in the city units of Roanoke Rapids and Weldon (two city administrative units also located within Halifax County). The Halifax County Board of Education subsequently declined to implement the plan which would have resulted in a majority of black students in 17 of the 18 schools in the Halifax County system.[3]

The legislative bill proposing the creation of a separate administrative unit for the schools of Scotland Neck, according to its proponents, was designed in response to Scotland Neck residents' dissatisfaction with the way in which the Halifax County Board of Education had allowed the schools in Scotland Neck to deteriorate. Only one county-wide school bond issue had passed since 1936, and that was in 1957. At that time, the separate units in Roanoke Rapids and Weldon, on a per-pupil basis, received a total of $1,020,000, and Halifax County received $1,980,000 for capital outlay. None of the proceeds of the bond issue was spent on any schools within the corporate limits of Scotland Neck. If the Scotland Neck schools had been operated as a separate unit at that time, the unit

[3] Mr. Franklin P. Shields, a resident of Scotland Neck and chairman of the Scotland Neck City Board of Education, testified on deposition that he felt public opinion was against the Interim Plan because the people did not generally understand it, because they were generally opposed to change of any kind and because there were administrative difficulties in implementing the plan. (Shields' Deposition, pp. 18–23.)

would have received approximately $190,000 as its proportionate share of the bond proceeds.

In 1963, as a result of the latest state-wide bond issue, the Halifax County Board of Education received a total of $950,000 as its proportionate share of the proceeds. Mr. W. Henry Overman, Superintendent of the Halifax County schools, testified on deposition that none of this money had been spent or committed for any school within the corporate limits of Scotland Neck. (Overman's Deposition, pp. 184, 187.) He also testified that Halifax County has gradually reduced the annual capital outlay tax for the schools from 63 cents per $100 valuation in 1957 to 27.5 cents per $100 valuation in the latest fiscal year. (Overman's Deposition, pp. 204–205.)

In 1963, some of the leaders of Scotland Neck began to formulate plans for the creation of a separate administrative unit for the schools of Scotland Neck but were not able to crystallize these plans into a legislative bill prior to the expiration of the 1963 session of the North Carolina legislature. In 1965, the proponents of a separate administrative unit did formulate a bill which would have provided for a separate unit for the administration of the schools in Scotland Neck and the four surrounding townships and would have provided for a supplemental tax of 25 cents on each $100 valuation throughout the new school district. The bill passed the House of Representatives but was defeated by the Senate, and it was the opinion of many in the Scotland Neck area that the defeat had been caused by the pressure of individuals residing in the townships outside the corporate limits of Scotland Neck.

In 1966, prompted by Mr. Henry Harrison, the only resident of Scotland Neck who was a member of the Halifax County Board of Education, a delegation con-

sisting of Mr. Harrison, Mr. C. M. Moore, chairman of the Halifax County Board of Education, and Mr. Overman, Superintendent of the Halifax County schools, met with Dr. Pearce and some other staff members in the office of the North Carolina Superintendent of Public Instruction, the Division of School Planning, to get approval for the construction of a new high school and gymnasium in Scotland Neck to replace the old high school and the building being used as a combination auditorium and gymnasium. The new facilities would have been completely integrated. The Halifax County Board of Education supported the requested construction for Scotland Neck, but it was not approved by the Division of School Planning. (Overman's Deposition, pp. 178–180).

In 1968, the leaders of Scotland Neck again began to make plans for the creation of a separate administrative unit for the operation of the Scotland Neck schools. This time they planned to limit the boundaries of the new district to the town limits of Scotland Neck because of the feeling that it was the residents of the area outside Scotland Neck who had contributed to the defeat of the bill in 1965. In November 1968, a group consisting of Frank Shields, the future chairman of the Scotland Neck City Board of Education, C. Kitchen Josey, Henry Harrison, and Thorne Gregory, the State representative from the area, visited the Tryon City unit, at that time the smallest school unit in the State with 823 students enrolled during the 1968–69 school year. At that time, 974 pupils were attending the schools within the corporate limits of Scotland Neck, and it was expected that, with transfers, any new administrative unit would have approximately the same number of pupils. It was felt that the Tryon City school was superior to any school in Halifax County, ranking 4th out of 160 units

in the State in percentage of high school graduates attending college, 31st in pupil-teacher ratio and 12th in library books per pupil. The tax base of Tryon was approximately the same as the tax base of Scotland Neck, and the Tryon unit also had a supplementary tax of 50 cents per $100 valuation. The group received a copy of the Tryon budget and the curriculum and discussed with the Tryon officials the amount of money needed to operate the system. The trip was primarily to study the financial feasibility of creating the separate unit in Scotland Neck (Shields' Deposition, pp. 11–12, 59–60). The Scotland Neck leaders talked to no other professional educators (with the exception of State Superintendent Craig Phillips, who opposed the creation of a new unit) and conducted no other studies before proposing the introduction of a bill in the State legislature. (Henry Harrison's Deposition, pp. 57–9).

The actual bill creating the separate unit in Scotland Neck was drafted by the North Carolina Attorney General's office and was introduced as House Bill No. 22. After receiving the approval of the House Education Committee, the House Finance Committee and the Senate Finance Committee, the bill passed both houses by a substantial majority and was ratified as Chapter 31 of the North Carolina Session Laws on March 3, 1969.[4]

Chapter 31 was a local act which authorized the creation of a separate public school administrative

[4] The actual title of Chapter 31 was: "An act to improve and provide public schools of a higher standard for the residents of Scotland Neck in Halifax County. To establish the Scotland Neck City admininstrative unit, to provide for the administration of the public schools in said administrative unit, to levy a special tax for the public schools of said administrative unit, all of which shall be subject to the approval of the voters in a referendum or special election."

unit to be known as the Scotland Neck City Administrative Unit pending approval by a majority of the voters of Scotland Neck in a special election to be held on April 8, 1969. The act also provided that, upon such approval, a special tax of 50 cents per $100 valuation be levied on property within the corporate limits of Scotland Neck, the school properties within the new system and all funds allocated for the operation of such schools be transferred from the Halifax County Board of Education to the new system and that the Mayor and Board of Commissioners of Scotland Neck be required to appoint a Board of Education to administer the new system.

Chapter 31 became operative on April 8, 1969, upon the approval of a majority of the voters of Scotland Neck. Of the 1305 registered voters, in a large turnout, 813 voted for approval, and 332 voted against the act. (Ferd Harrison's Deposition, pp. 16-21).

There was a mixed reaction to the bill by educators and the people of Halifax County. Most of the white leaders of Scotland Neck supported the bill. Mr. W. Henry Overman, Superintendent of the Halifax County Schools, was opposed to the bill. (Henry Harrison's Deposition, p. 12). Negro groups, specifically, one led by a Reverend Deloatche, generally opposed the bill. (Deposition of Aubrey Powell, black member of the Scotland Neck school board, p. 18). Craig Phillips, State Superintendent of Public Instruction and the only professional educator to testify against the bill in the legislature, opposed it on the grounds that it was contrary to the trend of consolidating school districts (Phillips' Deposition, p. 23), and because the number of students in the unit would be less than the number which he thought should be a minimum for the efficient operation of a school unit. (Phillips' Deposition, pp. 58, 59, 87-88).

Following approval of the act by the voters of Scotland Neck, the Mayor and Board of Commissioners of the Town appointed a five-member Board of Education. The Board then hired Franklin B. Bailey as superintendent, approximated the student enrollment for the 1969–70 school year and hired teachers. The Board also had a preregistration for students, established a curriculum, set up an athletic program and assigned teachers. At a two-day instruction session for teachers which began on August 18, 1969, the Board announced that new teachers should report on August 26th and that the students should report for the commencement of the school year on August 28th. The supplementary tax of 50 cents per $100 valuation was levied by the Board of Commissioners and the Town Tax Collector was instructed to collect it. (Ferd Harrison's Deposition, p. 22).[5]

At a joint meeting of the Halifax County and Scotland Neck school boards in June, the Halifax Board agreed to lease the Junior High School building which was just outside the boundaries of the new district to the Scotland Neck Board for one dollar per year. The Halifax Board has a similar arrangement with the Roanoke Rapids school unit with respect to the Chaloner school. The lease from Halifax County to Scotland Neck was first discussed at a joint meeting of the two boards in April or May. (C. M. Moore's Deposition, pp. 25–26). The lease arrangement amounted to extending the boundaries of the Scotland

[5] The collection of the tax of course ceased when this Court's preliminary injunction was entered against further implementation of Chapter 31. Much to the credit of the citizens of Scotland Neck, the supporters of the bill have financed this litigation by voluntary donations contributed in response to a solicitation in the *Scotland Neck Commonwealth*, the local newspaper, on October 10, 1969.

Neck unit to include approximately 10 additional acres, and the extension was approved by the State Board of Education on June 5, 1969. (Deposition of Franklin B. Bailey, Superintendent of the Scotland Neck System, pp. 19–20, Overman's Deposition, pp. 63–64).

One controversial aspect of this case is a transfer plan devised by the Scotland Neck Board of Education whereby students would be allowed to transfer into or out of the Scotland Neck unit to and from the Halifax County unit.[6] Under the plan a student could transfer into the system if he paid a fee which would compensate for the supplemental tax being paid by the parents of those students residing within the corporate limits of Scotland Neck. One hundred dollars would be charged for the first child in a family; $25 for the next two children; and the rest of the children in a family would be allowed to transfer in free of charge. As of August 25, 1969, 350 whites and 10 blacks had applied for transfer into the Scotland Neck system, and 44 black 11th and 12th graders had applied to transfer out of the Scotland Neck unit to attend the all-black Brawley High School.[7] Because of the controversial nature of the transfer plan and the charge that the plan permitted the Scotland Neck system to become a refuge for white students or

[6] Both the Roanoke Rapids and the Weldon city units have similar transfer plans, but, recently, restrictions have been placed on the number of students permitted to transfer from Halifax County into the two systems. (Overman's Deposition, pp. 166–169).

[7] Counsel for the Scotland Neck City Board of Education explained that the transfer of these black students in the 11th and 12th grades would be permitted only for the next two years in order to allow the students who had bought class rings, participated in athletics or had been chosen to leadership positions to remain in the all-black Brawley High School.

"white island," counsel for the Scotland Neck Board of Education in its First Further Answer attached to an Amended Answer filed on September 3, 1969, said the Scotland Neck unit, if permitted to operate, would limit its student enrollment to those students residing within the corporate limits of Scotland Neck plus or minus any transfers that may be permitted by law and that would be in accordance with a plan to be approved by this Court.[5]

The result of the creation of a separate administrative unit for Scotland Neck was to carve out of the Halifax County unit a smaller school district. Without the transfer system, there are 399 whites and 296 blacks of school age within the corporate limits of Scotland Neck. This does not include the children who would have entered the first grade in the fall of 1969. The Scotland Neck system would have been an integrated system throughout with black students comprising 42.6% of the student enrollment. There is one black member on the five-member school board, and the faculty would also be integrated. The effectuation of the proposed transfer plan would have created approximately the same ratio of white to black students that prevailed during the 1968–69 school year. In 1968–69, 786 whites attended Scotland Neck schools. Of those, 399 resided within the corporate limits and 387 resided outside Scotland Neck. With the transfer system as originally adopted, the net

[5] If the school district itself were found to be constitutional, it would not be difficult to fashion an acceptable transfer plan by either limiting transfers in and out such that the black-white ratio would be the same after accepting transfers or by accepting an equal number of blacks and whites. The problem of finding enough black students who could afford the transfer fees might be met by charging the paying transferees a higher fee.

effect would have been to have 759 white students (74%) in the schools of Scotland Neck and 262 black students (26%). The school facilities under the jurisdiction of the new unit will accommodate about 1,000 students.

The effect of the new unit on the other students in the county would be to leave the Halifax County unit with fewer whites in its school system. During the 1968–69 school year, the Halifax unit had a total of 10,655 students, of which 2,357 (22%) were white, 8,196 (77%) were black and 102 (1%) were Indian. The racial composition of the Halifax unit, with the originally proposed transfer system, would be as follows: white, 1,598 (16%); black, 8,186 (83%); Indian, 102 (1%). If the transfer system were not allowed or if a transfer system were devised which assured a larger number of black students in the Scotland Neck unit, the figures and percentages of course would change accordingly. Mr. Overman, Superintendent of the Halifax schools, testified on deposition that the Interim Plan proposed in the 1968 survey prepared for the Halifax County system could still be implemented even if the constitutionality of the Scotland Neck district were upheld. (Overman's Deposition, pp. 144–151). He also testified that Halifax County would still get the same amount of money per pupil from State, Federal and local sources and that the County would have an even better pupil-teacher ratio in certain areas of instruction.

One of the principal questions in passing on the constitutionality of Chapter 31 relates to the motivation of the proponents and supporters of the Scotland Neck legislation. The plaintiffs contend that the motivation behind the passage of the act was simply a desire to decrease the proportion of black students in the Scotland Neck schools. The defendants submit

that the primary reason for the legislation was a desire on the part of the people and leaders of Scotland Neck to increase the quality of education in the Scotland Neck schools. After closely scrutinizing the record and after carefully considering the arguments of counsel, this Court is of the opinion that the following motivating forces were responsible for the design of the legislation creating the separate Scotland Neck school district: (1) the desire to improve the educational level in the Scotland Neck schools, the present conditions in those schools having been brought about by a lengthy history of neglect and discrimination with respect to financial allocations to the Scotland Neck schools by the Halifax County Board of Education; (2) a desire on the part of the leaders of Scotland Neck to preserve a ratio of black to white students in the schools of Scotland Neck that would be acceptable to white parents and thereby prevent the flight of white students to the increasingly popular all-white private schools in the area; (3) a desire on the part of the people of Scotland Neck to control their own schools and be in a position to determine their direction with more finality than if the schools were a part of the Halifax County system. In ascertaining such a subjective factor as motivation and intent, it is of course impossible for this Court to accurately state what proportion each of the above reasons played in the minds of the proponents of the bill, the legislators or the voters of Scotland Neck, but it is sufficient to say that the record amply supports the proposition that each of the three played a significant role in the final passage and implementation of Chapter 31.

There is lengthy testimony supported by the historical treatment of the Scotland Neck schools by the Halifax County Board of Education to the effect

that the primary reason for the new district was that the people of Scotland Neck felt they could have a better education system if they could have a separate school district, levy a supplemental tax upon themselves and exert more local control over the operation of the schools within the corporate limits of the town. Mr. Aubrey Powell, the black member of the new Scotland Neck school board, testified on deposition that he thought the bill originated because the people of Scotland Neck thought it would provide a better education for their children. (Powell's Deposition, pp. 5–6). Mr. Powell said that the question of the private schools was never discussed among the school board of Scotland Neck and that the issue had never been mentioned to him. Dr. Craig Phillips said in his deposition that after discussing the bill with Josey, Harrison and Shields he was convinced that the major point of discussion and the reason for the proposed bill was "simply, concern about the quality of education for the youngsters involved in Scotland Neck." (Phillips' Deposition, p. 15). Mr. Henry Harrison, a strong proponent of the improvement of the Scotland Neck schools, testified that the people of Scotland Neck merely tried to improve the education of all the children, both black and white, and that it was his understanding that under the administration in the new school district, the dual school system would be abolshed. (Henry Harrison's Deposition, pp. 40–41). Mr. Overman, Superintendent in Halifax County, in discussing the reasons behind the bill proposed in 1965, said that its purpose was to give the people of Scotland Neck more control over their schools and enable them to have a supplementary local tax. (Overman's Deposition, pp. 172–176). He also cited the decrease in the annual capital expenditure outlay tax from

63 cents to 27.5 cents per $100 valuation. (Overman's Deposition, pp. 204–205).

The testimony and the candid admissions of counsel also indicate that the desire to preserve an acceptable white ratio in the school system was a factor behind the passage of the act. Mr. Harrison stated that he told the legislature that white children were going to private schools and that something needed to be done to retain the support of the white people for the public schools. (Henry Harrison's Deposition, p. 18). Mr. Shields and Mr. Overman both testified that they felt that integration would encourage the growth of the all-white private schools. (Overman's Deposition, pp. 217–218, Shields' Deposition, pp. 70–71). Mr. C. M. Moore said that it was his opinion that the independent school system would be a better alternative than the private schools. (Moore's Deposition, pp. 18–19). Mr. Shields testified to the same thing and said that most of the adults in Scotland Neck held the same opinion. (Shields' Deposition, pp. 23–26).

One factor which the plaintiff has attempted to use as proof that the bill will produce an inferior school system and that, therefore, it could not have been put forth for educational reasons is that there is substantial opinion among educators that there are considerable educational advantages to be derived from the greater efficiency and better allocation of resources frequently associated with the operation of school units with larger numbers of pupils. However, the Court feels impelled to consider the points raised by the arguments of counsel for both sides because of the great amount of effort put forth by both sides to show why the proposed school district in Scotland Neck might or might not be better than the Halifax County system out of which it was carved.

Many educators agree in general principle with the suggestion made in the report of the Governor's Study Commission [9] that the merger of administrative units is a desirable thing because it frequently leads to the increased efficiency in the operation of the public schools. Mr. Overman testified that the North Carolina Teacher's Association approves the suggested number of 9,000–10,000 as a desirable pupil population and the suggested minimum of 3,500–4,000 in the size of school units as recommended on page 164 of the study commission's report. (Overman's Deposition, p. 72). Dr. Craig Phillip is also firmly committed to the policy of consolidation and the advisability of reaching a 5,000 student population unit if possible and testified that the number of units in North Carolina has declined from a peak of 177 to the present number of 155. (Phillips' Deposition, pp. 35–36).

Further argument against the educational advantages of the new district is that the Scotland Neck school board did not actually make any plans to use the additional tax money for teachers' supplements. The only proposed change in salaries was to give the superintendent an $1,800.00 per year supplement. There were plans to set up a curriculum study program in the fall of 1969 to determine which courses would be of most benefit to the students in the Scotland Neck system, but the only planned changes in the school curriculum for the 1969-70 school year was

[9] The Report of the Governor's Study Commission on the Public School System of North Carolina is a 302-page report prepared by a 17-member commission appointed by Governor Dan K. Moore. The report was submitted December 3, 1968, and was prepared in response to the question "How best can the people of North Carolina meet their obligation to provide full educational opportunities for their children?" In conducting the study, the commission consulted experts, conducted research and visited a number of schools.

the elimination of the music course and some trade courses. (Powell's Deposition, pp. 23–24). There were no studies made prior to the introduction of the bill with respect to the educational advantages of the new district, and there was no actual planning as to how the supplement would be spent although some people assumed it would be spent on teachers' supplements.

The thing which makes it difficult for this Court to base its conclusions on the quality of education in the new unit is that there is so much conflict in the testimony. For example, Craig Phillips, although endorsing the trend toward mergers of school units, testified that he would ascribe very strongly to the statement on page 29 of the school survey of 1968 [10] that "the one best single determinant in the quality program of education is the financial factor. * * * " He testified that many of the smaller units do turn out a better product than the larger units and that he was aware that units in the 823–2,000 pupil category rank higher in many significant categories than some of the larger units. (Phillips' Deposition, pp. 93–95). This Court also, in examining the rankings of the various schools with respect to many categories, notes that the smaller schools do rank higher in some rather significant categories and that the Halifax County unit ranks near the bottom in a number of the categories.[11]

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[10] A survey of the Halifax County Schools prepared in September, 1968, by a seven-member committee under the supervision of the Division of School Planning in the North Carolina Department of Public Instruction and the direction of Dr. J. L. Pierce, Director.

[11] The Profile of Significant Factors in Education in North Carolina, a ranking of school administrative units prepared in July, 1968, by the Statistical Services Division of the North Carolina Department of Public Instruction, shows that the

Another factor worthy of mention is the plaintiff's introduction into evidence of several newspaper articles which discuss a supposed motivation for the bill. The articles taken from the *Raleigh News and Observer,* suggest that racial considerations, and not a concern for better education, motivated the legislation. For example, on February 2, 1969, the newspaper wrote that Halifax County Negroes outnumbered whites, that the reverse existed in Scotland Neck and that Halifax County Negroes had opposed the bill. On February 14, 1969, the paper commented editorially that the bill provided for an "educational island" dominated by whites and on February 22, 1969, suggested that if the bill passed, it would encourage other school districts to provide similar legislation. This Court has chosen to admit the newspaper

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Halifax system, the Tryon City system (smallest unit in the state), and the Tyrrell County system (small rural agricultural county) rank, in relation to the 166 units in the state and in the following categories, as follows:

	Tryon	Tyrrell	Halifax
1. Percent of classroom teachers with graduate certificates, table 1, p. 1	59	98	120
2. Percent of professional staff paid entirely from local funds, table 4, p. 13	54	87	135
3. Percent of classroom teachers with maximum experience for pay purposes, table 5, p. 17	14	5	84
4. Percent of classroom teachers with no prior experience, table 6, p. 21	160	38	12
5. Percent of high school graduates entering college, table 7, p. 25	4	134	162
6. Percent of high school graduates entering trade, business, or other schools, table 8, p. 29	86	63	123
7. Pupil to staff ratio, table 14, p. 49	31	69	138
8. Per pupil expenditures of local funds, table 24, p. 89	48	109	125

articles for the purpose of showing that they did appear and not for the purpose of showing the truth of the information contained in them.[12]

CONCLUSIONS OF LAW

Three legal principles are applicable to an analysis of the constitutional issues now before this court. The first is that any federal court should be hesitant to declare a state statute unconstitutional. As stated in *Phillips Petroleum Co.* v. *Jones*, 147 F. Supp. 122, 125 (D. Okla., 1955) (three-judge court):

> Federal jurisdiction, though existent, will not be exercised to strike down a state statute unless it is clearly and palpably unconstitutional upon its face, the enforcement of which will cause immediate and irreparable harm to the complainant, as to which there is no legal or administrative remedy. * * * [cites omitted.]

There is similar language in numerous other cases, but, for reasons which need not be considered at this time, the principle has not been applied extensively in cases involving race, civil rights or school desegregation; and the principle is therefore of limited relevancy in resolving the questions now under consideration.

The second applicable principle relates to what the Supreme Court and the lower courts have said about what school boards and state and local school officials must do to guarantee black students their constitutional rights in the area of school desegregation. The relevant cases here would appear to be *Brown* v.

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[12] Although there is authority for admitting the newspaper articles to show legislative intent where there are no other reports made contemporaneously with the passage of the act, e.g., *United States* v. *Louisiana*, 225 F. Supp. 353, 375n. 59 (E.D. La., 1963) (three-judge court), this Court has chosen to limit the admissability of the articles as stated.

Board of Education (Brown I), 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686 (1954), *Brown* v. *Board of Education* (Brown II), 349 U.S. 294, 99 L. Ed. 1083 75 S. Ct. 753 (1955), *Green* v. *New Kent County School Board,* 391 U.S. 430, 20 L. Ed. 2d 716, 88 S. Ct. 1689 (1968), *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19, 24 L. Ed. 2d 19, 90 S. Ct. 29 (October 29, 1969).

As this Court reads and interprets these relevant opinions, it would seem that the Supreme Court is concerned about establishing school systems which operate and assign their students to a particular school without regard to the student's race or color. Justice Brennan, speaking for the Court in the *Green* decision said the following:

> It was * * * dual systems that 14 years ago Brown I held unconstitutional and a year later Brown II held must be abolished; * * * 391 U.S. at 435, 20 L. Ed. 2d at 722.

and

> The transition to a unitary, non-racial system of public education was and is the ultimate end to be brought about; * * * 391 U.S. at 436, 20 L. Ed. 2d at 722.

Brown II used the phrase "racially nondiscriminatory school system" and *Green* used the phrase "unitary nonracial school system" as the description of that which the Constitution requires.

The requirement that school systems must be nonracial was injected with an air of immediacy by the *Green* decision in May, 1968. An even stronger demand for desegregation *now* was made in October, 1969, when the Court, in a per curium opinion, *Alexander* v. *Holmes County Board of Education,* stated that the "all deliberate speed" standard was no longer applicable and that "* * * the obligation of every school district is to terminate dual school systems at once

and to operate now and hereafter only unitary schools." 24 L. Ed. 2d at 21.

As of the entry of this Opinion and Order the Supreme Court has failed to give an exact definition of a unitary nonracial school system. Although the Supreme Court has condemned gerrymandering, freedom-of-choice plans, free-transfer plans, and racially identifiable schools, student bodies or faculties which to retain the vestiges of the segregated dual system, no case has been brought to the attention of this Court (with the possible exception of a recent Georgia case) which requires any specific ratios of blacks to whites in a classroom, school or school district. Despite newspaper articles and perhaps some district court opinions to the contrary, the Supreme Court has not yet required bussing or population changes to effect particular black-white ratios in the schools. The emphasis of the Court has been on the nature of the school system and how it treats and assigns its students and faculty members. The Supreme Court has not yet concerned itself with the actual numbers of blacks and whites attending school together except where the numbers or percentages reflect that the school system is assigning its students or faculty or making some decisions on the basis of the race of the individuals involved.

The third legal principle relevant to the analysis of this case is that stated in *Gomillion* v. *Lightfoot*, 364 U.S. 339, 5 L. Ed. 2d 110, 81 S. Ct. 125 (1960) that "acts generally lawful may become unlawful when done to accomplish an unlawful end." In that case, the Supreme Court invalidated an Alabama statute which had redefined the boundaries of the City of Tuskegee to reduce the black vote. Legislative manipulation to affect the constitutional rights of blacks has been a familiar practice in several southern

states in recent years, two examples being found in *Hall* v. *St. Helena Parish School Board,* 197 F. Supp. 649 (E.D. La., 1961), and *Poindexter* v. *Louisiana Financial Assistance Commission,* 275 F. Supp. 833 (E.D. La., 1967), aff'd, 389 U.S. 571, 19 L. Ed. 2d 780, 88 S. Ct. 693 (1968), two cases by three-judge courts which struck down attempts by the Louisiana legislature to continue a segregated public school system under the guise of assistance payments to private school students.

Applying this principle to the assignment of pupils, the case of *Haney* v. *County School Board of Education Sevier County,* 410 F. 2d 920 (8th Cir. 1969), becomes relevant. In that case, plaintiffs challenged the existence of an all-black school in one district of the county and an all-white school in a different district of the same county. The district court dismissed the complaint on the grounds that the districts had not been created for the purposes of denying plaintiffs their constitutional rights and were therefore valid. The court of appeals reversed the district court on the grounds that the creation of the districts, in accordance with a statutory reorganization of Arkansas schools in 1948 in accordance with the then-existing Arkansas law, was unconstitutional because the 1948 law required Arkansas schools to be segregated and the boundaries of the school districts were obviously drawn to continue the segregated schools. In this Court's opinion, the holding in the *Haney* case was simply that the maintenance of segregated schools cannot be justified "simply because of the pre-*Brown* geographic structuring of school districts."

Also demonstrative of the Gomillion principle is the Supreme Court decision in *Monroe* v. *Board of Commissioners of the City of Jackson, Tennessee,* 391 U.S. 450, 20 L. Ed. 2d 733, 88 S. Ct. 1700 (1968),

in which the Supreme Court struck down a free-transfer plan which enabled a child, after first registering at the assigned school in his attendance zone, to transfer to the school of his choice if space were available. The Court objected to the plan on the grounds that it delayed the conversion to a unitary nonracial system where, after three years of operation under the plan, all of the whites remained in the white school and 80% of the blacks remained in the black school.

Perhaps the two most relevant, but still distinguishable cases are two district court decisions rendered within the last few months in Virginia and Arkansas. In *Burleson* v. *County Board of Election Commissioners of Jefferson County,* No. PB–69–C–65 (E.D. Ark., September 22, 1969), an opinion by District Judge J. Smith Henley, the plaintiffs, residents of the Dollarway School District, challenged the implementation of the results of a local election which would have permited the Hardin area of the district, a noncontiguous area with a 99%-white student population, to be severed from the district. The court enjoined the implementation of the election on the grounds that severance would impede the Dollarway School Board's efforts to comply with that court's order to integrate the schools and because the Board would have had difficulty in finding white teachers who would teach in the district if blacks greatly outnumbered whites. Also, the district would have lost some operating funds and there were no schools or other facilities in the Hardin area available for the school children in that area.

The second case is *Wright* v. *County School Board of Greensville County,* No. 4263 (E.D. Va., August 8, 1969), a decision by District Judge Robert R. Merhige. In that case, the Greensville County School Board was

in the process of carrying out a court-ordered plan of desegregation, and the City Council and other officers of the City of Emporia, on July 9, 1969, convened a special meeting to establish a separate city school system. On July 10th, the mayor sought to buy or lease from the county the school buildings located within the city. At a July 14th meeting, after hearing the mayor express his dissatisfaction with the proposed plan of desegregation for the county, the City Council unanimously decided to instruct the City School Board to take steps to establish a separate school division for the city. On July 23rd, the City Council adopted a resolution requesting the State Board of Education to authorize the creation of a separate school division. The City School Board notified the county board that no city children would attend the county system thereafter and that the city would no longer share the costs of the county system. The plan of operation proposed by the City of Emporia would have afforded those students residing outside of the city the opportunity to attend the city schools on a "tuition-no transportation" basis. The members of the City School Board offered no assistance to the county board in the submission of a plan of desegregation to the district court.

The district court found as a matter of law that the City School Board, as successor to the Greensville County Board, was required to disestablish racial segregation in the school system in accordance with the plan approved by the court. The establishment and operation of a separate school system would have been an impermissible interference and frustration of the court's order.

Application of the constitutional case law to the issue before this Court, the separation of the Scotland Neck school unit from the larger Halifax County unit,

creates a more difficult question than this Court has been able to find in any of the questions presented in the earlier cases. With the transfer system as it was originally proposed, this Court would probably have less difficulty in finding the scheme unconstitutional, because the Scotland Neck school district in view of the economics of the situation, that is, the inability of blacks to afford the transfer fees, would become a refuge or haven for those white students in the county who wished to escape the real or imagined disaster of a substantial black majority in the Halifax County System. Now that the defendant Scotland Neck City Board of Education, in its First Further Answer of September 3, 1969, has agreed to either eliminate the transfer system or adopt a system which would comply with the Board's constitutional obligations, the question has become even more difficult. What this Court is now faced with is assessing the results of the creation of the new unit strictly in terms of the effect it has on the relationship of those students residing within the corporate limits of Scotland Neck and those residing in Halifax County. The creation of the new unit does take some of the white students out of the Halifax County unit and thereby does reduce the proportion of whites in a school system already top-heavy with black students.

It is apparent that Chapter 31, of the Session Laws of 1969 was enacted with the effect of creating a refuge for white students of the Halifax County School system, and interferes with the desegregation of the Halifax County School system, in accord with the plan adopted by said Board to be implemented on or before June 1, 1970.

THEREFORE, this Court's findings of fact that the legislative bill creating the district was at least partially motivated by a desire to stem the flight of white

students from the public schools, the Court must find that the act is unconstitutional and in violation of the Equal Protection Clause of the 14th amendment and must enter permanent injunctive relief for the plaintiff.

Since the record in this case conclusively shows that the Act of the General Assembly creating the Scotland Neck unit in Halifax County serves no State interest and prevents the Halifax County Board of Education from complying with the orders of this court issued in protection of constitutional rights, it is the court's opinion that Chapter 31 of the North Carolina Session Laws of 1969 is unconstitutional. A judgment in accordance with this opinion will be entered by the court.

ORDER

NOW, THEREFORE, in accordance with the foregoing, it is:

ORDERED that the further implementation of Chapter 31 of the 1969 Session Laws of North Carolina be, and the same hereby is, permanently enjoined; and,

ORDERED that the Clerk shall serve copies of this OPINION and ORDER upon all counsel of record.

Let this ORDER be entered forthwith.

Algernon L. Butler,
ALGERNON L. BUTLER,
Chief Judge,
United States District Court.

John D. Larkins, Jr.,
JOHN D. LARKINS, JR.,
United States District Judge.

May 23, 1970.

A True Copy, Teste: Samuel A. Howard, Clerk, by C. R. Sanger, Deputy Clerk.

APPENDIX E

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 14,929

UNITED STATES OF AMERICA, AND PATTIE BLACK COTTON, EDWARD M. FRANCIS, PUBLIC SCHOOL TEACHERS OF HALIFAX COUNTY, ET AL., APPELLEES

v.

SCOTLAND NECK CITY BOARD OF EDUCATION, A BODY CORPORATE, APPELLANT

Appeal from the United States District Court for the Eastern District of North Carolina

This cause came on to be heard on the record from the United States District Court for the Eastern District of North Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed; and the case is remanded to the United States District Court for the Eastern District of North Carolina, at Wilson, with instructions to dissolve its injunction and retain jurisdiction to consider plans of integration proposed by Halifax County Board of Education and by Scotland Neck Board of Education.

SAMUEL W. PHILLIPS,
Clerk.

A True Copy, Teste:

SAMUEL W. PHILLIPS,
Clerk.

By DIANE HUDSON,
Deputy Clerk.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 14990

ALVIN TURNER, ET AL., AND JOANNE AMELIA CLAYTON, ET AL., APPELLEES

versus

THE LITTLETON-LAKE GASTON SCHOOL DISTRICT, A PUBLIC BODY CORPORATE OF WARREN COUNTY AND HALIFAX COUNTY, NORTH CAROLINA, APPELLANT

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh

Algernon L. Butler and *John D. Larkins, Jr.*, District Judges.

Argued December 7, 1970—Decided March 23, 1971

Before HAYNSWORTH, Chief Judge, SOBELOFF, BOREMAN, BRYAN, WINTER, CRAVEN and BUTZNER, Circuit Judges sitting en banc

William S. McLean (*McLean, Stacy, Henry & McLean; James H. Limer; Robert Morgan,* Attorney General of North Carolina, and *Ralph Moody,* Deputy Attorney General of North Carolina, on brief) for Appellant, and *Adam Stein* (*J. LeVonne Chambers,* and *Chambers, Stein, Ferguson & Lanning; T. T. Clayton* and *Frank Ballance,* and *Clayton* and *Ballance; Conrad O. Pearson; Jack Greenberg, James M. Nabrit, III,* and *Norman Chachkin* on brief) for Appellees.

CRAVEN, *Circuit Judge:* This is one of three cases on appeal in which the court below enjoined the carving out of a new school district containing approximately 50 percent white students and 50 percent black students from a county school district containing a substantial majority of black students. In the other two cases, we reversed the district court. *United States* v. *Scotland Neck Board of Education*, — F. 2d —, Nos. 14929 and 14930 (4th Cir. ——, 1971); *Wright* v. *Council of City of Emporia*, — F. 2d —, No. 14552 (4th Cir. ——, 1971). In this one, we affirm.

This suit to compel the desegregation of the Warren County school system was begun in 1963. Back then Warren County had assigned all of the white students to six all-white schools, all of the black students to thirteen all-black schools and all of the Indian students to one all-Indian school. During the school years beginning in the fall of 1964, 1965 and 1966, Warren County assigned its students to the various schools through a freedom of choice plan. On May 16, 1967, the district court determined that the freedom of choice plan had failed to materially alter the previously existing racially segregated school system and ordered the Warren County School Board to take affirmative action to eliminate the dual school system. The affirmative action taken by the school board was to assign a handful of black and Indian students to predominantly white schools and assign four teachers across racial lines. On July 31, 1968, the district court found that Warren County was still operating a dual school system and ordered the school board to file a plan for the elimination of racial segregation. The first two plans were rejected as inadequate. Finally, on December 1, 1968, the school board submitted a third plan providing for geographic attendance zones

to take effect with the beginning of the 1969–70 school year. This plan was approved by the district court in July 1969.

Opposition to the school board's third plan arose soon after it was submitted. The opposition resulted in proposals for the creation of separate school districts for the town of Warrenton and the area surrounding the town of Littleton. Bills were introduced to the North Carolina legislature to carve new school districts for these two areas out of the existing Warren County school district. The governing bodies of the two new school districts were denominated the Warrenton City Board of Education and the Littleton-Lake Gaston School District. The Warren County Board of Education approved petitions urging the passage of these bills. The two bills were passed by the North Carolina legislature and ratified as Chapters 578 and 628 of the 1969 North Carolina Session Laws. The residents of both affected areas approved the creation of the new school districts by referendum.

On July 17, 1969, the plaintiffs filed a supplemental complaint seeking a declaratory judgment that Chapters 578 and 628 of the 1969 North Carolina Session Laws were unconstitutional and seeking an injunction against the operation of the two newly created school systems. On August 25, 1969, a temporary injunction against the operation of the two new school districts was issued by the United States District Court for the Eastern District of North Carolina. The injunction was made permanent on May 26, 1970. The Littleton-Lake Gaston School District appealed. The Warrenton City Board of Education has not appealed.

The constitutionality of the legislation creating the Littleton-Lake Gaston School District depends on whether its primary purpose is to prevent, insofar as

is possible, the dismantling of the former dual school system. *Wright* v. *Council of City of Emporia*, — F. 2d. —, No. 14552 (4th Cir. ———, 1971). Legislatures are assumed to intend the natural and reasonable effect of the legislation they enact. "In a legal sense the object or purpose of legislation is to be determined by its natural and reasonable effect. . . ." *People ex rel. Parke, Davis & Co.* v. *Roberts*, 171 U.S. 658 (1898).

Looking at effect only, and ignoring the abortive creation of the Warrenton City School district, this case is similar to *Scotland Neck* and *Emporia, supra*. Removing the students who were to attend the Littleton-Lake Gaston School District would alter the racial balance in the remaining Warren County school district by, at most, 5.5 percent, from 28 percent white, 67 percent black and 6 percent Indian, to 21.5 percent white, 72.5 percent black and 6 percent Indian.[1] There would be a substantial majority of black students in the Warren County system whether or not these students were removed. Also, paralleling *Scotland Neck* and *Emporia*, the Littleton-Lake Gaston school officials argued in the district court that the creation of the special school district was designed to remedy long standing financial difficulties and to prevent the imminent elimination of school facilities from the town of Littleton. The town of Littleton lies partly in Warren County and partly in Halifax County.

[1] The appellants and the appellees disagree on the method that should be employed to measure the effect of the removal of the students who were to attend the Littleton-Lake Gaston School District on the racial balance in Warren County. According to the appellants, the effect would have been a change in the racial balance in the remaining Warren County system of no more than 2.6 percent. Our disposition of this case does not require us to resolve this dispute.

Historically, students from both Warren County and Halifax County attended school in Littleton, although the school was officially part of the Warren County school system. The Warren County Board refused to fund the Littleton school at a level commensurate with other schools in the system arguing that Halifax County should provide support for the students from Halifax County. The Halifax County Board refused to provide funds for a school run by Warren County. Apparently as a result of this financial dilemma, the physical condition of the school building in Littleton was deteriorating. A report by the North Carolina Division of School Planning in 1965 recommended the eventual abandonment of school facilities presently in use in Littleton. Although the report did not specify where replacement facilities would be erected, the Littleton officials apparently assume that they would not be located in Littleton.

Despite these similarities, we think there are important differences that distinguish this case from *Scotland Neck* and *Emporia*. In both *Scotland Neck* and *Emporia*, the district courts specifically found that there were non-invidious purposes for the creation of the new school districts. The opinion below in this case, signed by the same two district judges who sat in *Scotland Neck*, contains no such findings. In both *Scotland Neck* and *Emporia*, the geographic boundaries of the new school districts are the previously existing boundaries of the two cities. The Littleton-Lake Gaston School District is composed of the town of Littleton, two townships in Warren County and part of a third township in Halifax County. Why U.S. 158 was selected as the southern boundary for the new school district is not satisfactorily explained. New boundary lines are suspect and require close scrutiny to assure that they are not gerrymandered for invid-

ious purposes. Although the financial difficulties of the Littleton school are of long standing and the report recommending the abandonment of the Littleton school facilities predates the creation of the Littleton-Lake Gaston School District by four years, there were no attempts by the residents of the Littleton area to obtain a separate school district prior to the time that effective integration was imminent as there were in *Scotland Neck*. Unlike *Emporia*, the residents of the Littleton area have not been deprived of their proportionate voice in the governmental affairs of Warrent County.

But we need not decide whether these differences alone are sufficient to compel a result different from the disposition of *Scotland Neck* and *Emporia*. In determining the purpose of legislation, it is appropriate to consider not only the effect of the legislation itself, but also the history and setting out of which the legislation arose. See *Poindexter* v. *Louisiana Financial Assistance Commission*, 275 F. Supp. 833 (E.D. La. 1967), aff'd per curiam, 389 U.S. 571 (1968). The adverse reaction and strong opposition to the third desegregation plan submitted by the Warren County Board of Education plainly fueled the creation of the two new school districts, Littleton-Lake Gaston and the Warrenton City Administrative Unit. The two bills creating these school districts were introduced on April 10 and 11, 1969, a day apart, and were ratified three days apart. Both were "local bills" sponsored by representatives to the North Carolina legislature from districts including Warren County. The court below focused, quite properly, on the combined effect of these two bills. The net effect of both bills would have been to reduce the number of white students in the Warrenton County school system from 1,415 (27 percent) to 260 (7 percent)—allowing more

than four out of five white students to escape the heavily black schools of Warren County.[2] The finding of the district court that the primary purpose of the legislation was to carve out a refuge for white students and preserve to the extent possible segregated schools in Warren County is supported by substantial evidence, and indeed, is inescapable. Accordingly, we affirm the judgment of the district court enjoining the establishment of the Littleton-Lake Gaston School District.

Affirmed.

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[2] These figures include the net effect of transfer plans adopted by both the Littleton-Lake Gaston School District and the Warrenton City Board of Education. In *Scotland Neck* we concluded that the effect of a transfer plan adopted by the Scotland Neck Board of Education had no relevance to the question of the constitutionality of the legislation creating the Scotland Neck school district because there was nothing in the record to suggest that the legislature was aware that Scotland Neck would adopt a transfer plan. In this case, however, such evidence does appear in the record. The school facilities in Warrenton had a capacity of 1,000 to 1,200 students but the Warrenton City Unit contained only 206 resident students. The district court found that Warren County could not accommodate its present students without utilizing the surplus space in Warrenton and that Warrenton could not maintain acceptable educational standards in a 12-grade school system containing only 200 students. Thus, Warrenton could not operate a separate school system without a substantial number of students transferring from the county. In addition, there was direct testimony by State Senator Julian Allsbrock, one of the sponsors of the Littleton-Lake Gaston bill, that there was some discussion of students transferring into the Littleton-Lake Gaston School District while the bill was pending. Volume III, Record on Appeal, Transcript of Hearing at Raleigh, North Carolina, December 17, 1969, at 23, 59.

APPENDIX G

Section 407 of the Civil Rights Act of 1964, 42 U.S.C. 2000c–6, provides:

"(a) Whenever the Attorney General receives a complaint in writing—

> (1) signed by a parent or group of parents to the effect that his or their minor children, as members of a class of persons similarly situated, are being deprived by a school board of the equal protection of the laws, or
>
> (2) signed by an individual, or his parent, to the effect that he has been denied admission to or not permitted to continue in attendance at a public college by reason of race, color, religion, or national origin,

and the Attorney General believes the complaint is meritorious and certifies that the signer or signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly achievement of desegregation in public education, the Attorney General is authorized, after giving notice of such complaint to the appropriate school board or college authority and after certifying that he is satisfied that such board or authority has had a reasonable time to adjust the conditions alleged in such complaint, to institute for or in the name of the United States a civil action in any appropriate district court of the United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of procedings instituted pursuant to this

section, provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards. The Attorney General may implead as defendants such additional parties as are or become necessary to the grant of effective relief hereunder.

"(b) The Attorney General may deem a person or persons unable to initiate and maintain appropriate legal proceedings within the meaning of subsection (a) of this section when such person or persons are unable, either directly or through other interested persons or organizations, to bear the expense of the litigation or to obtain effective legal representation; or whenever he is satisfied that the institution of such litigation would jeopardize the personal safety, employment, or economic standing of such person or persons, their families, or their property.

"(c) The term 'parent' as used in this section includes any person standing in loco parentis. A 'complaint' as used in this section is a writing or document within the meaning of section 1001, Title 18, United States Code."

APPENDIX H

Chapter 31 of the 1969 Session Laws of North Carolina, is entitled and provides:

"AN ACT TO IMPROVE AND PROVIDE PUBLIC SCHOOLS OF A HIGHER STANDARD FOR THE RESIDENTS OF SCOTLAND NECK IN HALIFAX COUNTY, TO ESTABLISH THE SCOTLAND NECK CITY ADMINISTRATIVE UNIT, TO PROVIDE FOR THE ADMINISTRATION OF THE PUBLIC SCHOOLS IN SAID ADMINISTRATIVE UNIT, TO LEVY A SPECIAL TAX FOR THE PUBLIC SCHOOLS OF SAID ADMINISTRATIVE UNIT, ALL OF WHICH SHALL BE SUBJECT TO THE APPROVAL OF THE VOTERS IN A REFERENDUM OR SPECIAL ELECTION

"SECTION 1. There is hereby classified and established a public school administrative unit to be known and designated as the Scotland Neck City Administrative Unit which shall consist of the territory or area lying and being within the boundaries or corporate limits of the Town of Scotland Neck in Halifax County, and the boundaries of said Scotland Neck City Administrative Unit shall be coterminous with the present corporate limits or boundaries of the Town of Scotland Neck. The governing board of said Scotland Neck City Administrative Unit shall be known and designated as the Scotland Neck City Board of Education, and said Scotland Neck City Board of Education (hereinafter referred to as: Board) shall have and exercise all of the powers, duties, privileges and authority granted and applicable to city administrative units and city boards of education as set forth in Chapter 115 of the General Statutes, as amended.

"SEC. 2. The Board shall consist of five members appointed by the governing authority of the Town of Scotland Neck, and said five members shall hold office until the next regular municipal election of the Town of Scotland Neck to be held in May, 1971. At the regular election for Mayor and Commissioners of the Town of Scotland Neck to be held in May 1971, there shall be elected five members of the Board, and three persons so elected who receive the highest number of votes shall hold office for four years and the two persons elected who receive the next highest number of votes shall hold office for two years, and thereafter all members of the Board so elected, as successors, shall hold office for four years. All members of the Board shall hold their offices until their successors are elected and qualified. All members of the Board shall be eligible to hold public office as required by the Constitution and laws of the State.

"SEC. 3. All members of the Board shall be elected by the qualified voters of the Town of Scotland Neck and said election shall be held and conducted by the governing authority of the Town of Scotland Neck and by its election officials and pursuant to the same laws, rules and regulations as are applicable to the election of the municipal officials of the Town of Scotland Neck, and the results shall be certified in the same manner. The election of members of the Board shall be held at the same time and place as applicable to the election of the Mayor and Board of Commissioners of the Town of Scotland Neck and in accordance with the expiration of terms of office of members of the Board. The members of the Board so elected shall be inducted into office on the first Monday following the date of election, and the expense of the election of the members of the Board shall be paid by the Board.

"SEC. 4. At the first meeting of the Board appointed as above set forth and of a new Board elected as herein provided, the Board shall organize by electing one of its members as chairman for a period of one year, or until his successor is elected and qualified. The chairman shall preside at the meetings of the Board, and in the event of his absence or sickness, the Board may appoint one of its members as temporary chairman. The Scotland Neck City Superintendent of Schools shall be ex officio secretary to his Board and shall keep the minutes of the Board but shall have no vote. If there exists a vacancy in the office of Superintendent, then the Board may appoint one of its members to serve temporarily as secretary to the Board. All vacancies in the membership of the Board by death, resignation, removal, change of residence or otherwise shall be filled by appointment by the governing authority of the Town of Scotland Neck of a person to serve for the unexpired term and until the next regular election for members of the Board when a successor shall be elected.

"SEC. 5. All public school property, both real and personal, and all buildings, facilities, and equipment used for public school purposes, located within the corporate limits of Scotland Neck and within the boundaries set forth in Section 1 of this Act, and all records, books, moneys budgeted for said facilities, accounts, papers, documents and property of any description, shall become the property of Scotland Neck City Administrative Unit or the Board; all real estate belonging to the public schools located within the above-described boundaries is hereby granted, made over to, and automatically by force of this Act conveyed to the Board from the County public school authorities. The Board of Education of Halifax County is authorized and directed to execute any and

all deeds, bills of sale, assignments or other documents that may be necessary to completely vest title to all such property in the Board.

"SEC. 6. Subject to the approval of the voters residing within the boundaries set forth in Section 1 of this Act, or within the corporate limits of the Town of Scotland Neck, as hereinafter provided, the governing authority of the Town of Scotland Neck, in addition to all other taxes, is authorized and directed to levy annually a supplemental tax not to exceed Fifty Cents (50¢) on each One Hundred ($100.00) Dollars of the assessed value of the real and personal property taxable in said Town of Scotland Neck. The amount or rate of said tax shall be determined by the Board and said tax shall be collected by the Tax Collector of the Town of Scotland Neck and paid to the Treasurer of the Board. The Board may use the proceeds of the tax so collected to supplement any object or item in the school budget as fixed by law or to supplement any object or item in the Current Expense Fund or Capital Outlay Fund as fixed by law.

"SEC. 7. Within ten days from the date of the ratification of this Act it shall be the duty of the governing authority of the Town of Scotland Neck to call a referendum or special election upon the question of whether or not said Scotland Neck City Administrative Unit and its administrative board shall be established and whether or not the special tax herein provided shall be levied and collected for the purposes herein provided. The notice of the special election shall be published once a week for two successive weeks in some newspaper published in the Town of Scotland Neck or having a general circulation in the Town of Scotland Neck. The notice shall contain a brief statement of the purpose of the special election, the area in which it shall be held, and that a vote by a majority

of those voting in favor of this Act will establish the Scotland Neck City Administrative Unit and its Administrative Board as herein set forth, and that an annual tax not to exceed Fifty Cents (50¢) on the assessed valuation of real and personal property, according to each One Hundred Dollars ($100.00) valuation, the rate to be fixed by the Board, will be levied as a supplemental tax in the Town of Scotland Neck, for the purpose of supplementing any lawful public school budgetary item. A new registration of voters shall not be required and in all respects the laws and regulations under which the municipal elections of the Town of Scotland Neck are held shall apply to said special election. The governing authority of the Town of Scotland Neck shall have the authority to enact reasonable rules and regulations for the necessary election books, records and other documents for such special election and to fix the necessary details of said special election.

"SEC. 8. In said referendum or special election a ballot in form substantially as follows shall be used:

VOTE FOR ONE:

(☐) FOR creating and establishing Scotland Neck City Administrative Unit with administrative Board to operate public schools of said Unit and for supplemental tax not to exceed Fifty Cents (50¢) on the assessed valuation of real and personal property according to each One Hundred Dollars ($100.00) valuation for objects of school budget.

(☐) AGAINST creating and establishing Scotland Neck City Administrative Unit with administrative Board to operate public schools of said Unit and against supplemental tax not to exceed Fifty Cents (50¢) on the assessed valua-

tion of real and personal property according to each One Hundred Dollars ($100.00) valuation for objects of school budget.

"If a majority of the qualified voters voting at such referendum or special election vote in favor of establishing Scotland Neck City Administrative Unit, for creation of administrative Board to operate public schools of said Unit and for special supplemental tax as herein set forth, then this Act shall become effective and operative as to all its provisions upon the date said special election results are canvassed and the result judicially determined, otherwise to be null and void. The expense of said referendum or special election shall be paid by the governing authority of the Town of Scotland Neck but if said Unit and Board are established, then said Town of Scotland Neck shall be reimbursed by the Board for said expense as soon as possible.

"SEC. 9. All laws and clauses of laws in conflict with this Act are hereby repealed.

"SEC. 10. This Act shall be in full force and effect according to its provisions from and after its ratification."

U.S. GOVERNMENT PRINTING OFFICE: 1971